

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20535

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STATEMENT OF QUESTIONS PRESENTED

1. In a case arising from a collision on the Potomac River between a motorboat operated by appellant and a motorboat operated by appellee Long, as the result of which appellee Stull, a passenger on appellee Long's boat, suffered injury, whether there is sufficient evidence in the record to support the District Court's finding that the accident was caused by negligence on the part of the appellant.

2. Whether there is sufficient evidence in the record to support the District Court's finding that there was no concurring or contributory negligence on the part of appellee Long in causing the accident involved.

3. Whether the order of the District Court that appellee Stull recover the sum of \$21,000 in damages is clearly erroneous on the ground that the said sum is grossly excessive in light of the evidence of record concerning the nature and extent of appellee's injury.

4. Whether the District Court erred in admitting the testimony of Edward H. Nabb, testifying for appellee Stull as an expert on the subject of motorboats, in which, on the basis of a hypothetical question, he expressed his opinion as to the cause of the accident, when the District Court, as trier of the facts, was equally competent to make its own conclusion on this issue and was therefore not properly assisted by such opinion.

5. Whether the District Court erred in limiting appellant's cross-examination of appellee Stull's treating physician, Dr. Douglas R. Koth, by refusing to permit appellant to cross-examine Dr. Koth as to all his notes and records relating to his treatment of appellee.

6. Whether the District Court erred in allowing appellee Stull to cross-examine appellant, for the purpose of impeachment, as to a statement made by him in a United States Coast Guard accident report he filed with the Maryland Department of Tidewater Fisheries, which report is, by applicable law and regulations, not to be released and not to be referred to in any way in any judicial proceeding.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20113

ROBERT I. ENGLE, *Appellant*

v.

EMOGENE I. STULL AND THOMAS LONG, *Appellee*

**Appeal From A Judgment Of The United States District Court
For The District Of Columbia**

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction under Title 28, United States Code, Section 1291, and under Title 11, Section 321(a), D.C. Code (1961 Ed.) (Supp. V 1966) to review the order of the District Court. The District Court had jurisdiction under Title 11, Section 521(a)(1), D.C. Code (1961 Ed.) (Supp. V 1966). See Complaint (J.A. p. 2).

STATEMENT OF THE CASE

In the afternoon of Sunday, August 12, 1962, on the Potomac River in the State of Maryland about one mile south of Marshall Hall, a motorboat owned and operated by appellant suddenly went out of control, swerved, cap-sized, and then collided with a motorboat owned and operated by appellee Thomas Long. As the result of the collision, appellee Emogene Stull, a passenger on the Long boat, suffered the injuries of which she complains.

The two motorboats had left Thomas Long's boat yard in the District of Columbia earlier that day to travel downstream to Sweden Point for dinner (J.A., p. 209, 217). They stopped for gas at Alexandria and then stopped again for a few moments in the middle of the river at Marshall Hall (J.A., pp. 31, 235). In proceeding south from Marshall Hall, Thomas Long's boat departed first because appellant's boat was heading upstream and had to turn around (J.A., p. 235). By the time of the accident and for approximately a quarter of a mile north of where it occurred, appellant's boat had caught up so that the two boats were proceeding together at about 30 to 35 miles per hour south on a parallel course, nearer the Maryland side of the river, with appellant's boat about 100 feet to the front of appellee Long's boat and about 50 feet to its left (J.A., pp. 93, 94, 96, 213, 235, 237.)*

*Miss Stull claimed that, right before the accident, the Long boat was going very slowly so that two of the passengers could change positions (J. A., p. 66) and that appellant's boat was "skipping along" toward them from behind, "actually leaving the water at certain points" (J. A., p. 31). She implied that the boat had not regained speed when the accident happened (J. A., p. 74), and could not say that appellant's boat had passed them when it swerved to the right (J. A., p. 73). This view is opposed to the testimony of all other witnesses (J. A., pp. 94, 189, 211, 219, 236, 252), and Miss Stull's counsel did not mention it in his hypothetical question to Mr. Nabb, her expert witness (J. A., pp. 96-7). In her deposition in July of 1964, Miss Stull said she "can't judge as far as speed goes, but we weren't going fast . . . I would say maybe 30 miles an hour, but we weren't going fast" (J. A., p. 261), which is the speed at which appellant and appellee Long stated they were travelling.

The day was clear, "beautiful", and sunny, with a "slight chop" on the water (J.A., pp. 34, 95, 209, 236). There were many boats in the area, and the river there was about a mile wide (J.A., pp. 35, 95, 111, 227, 236). Miss Stull estimated that there were as many as 10 to 15 boats within a radius of one or two city blocks (J.A., p. 35), whereas appellant testified that the boats were "more than a couple of blocks away" (J.A., p. 227). He and Mr. Long saw no boats immediately to their front (J.A., pp. 230, 236-7), and Mr. Long saw none close enough to create a hazard (J.A., p. 247). He said the boats in the area were on the Virginia side some three quarters of a mile in front of them and a quarter of a mile to their right (J.A., p. 237). Shortly before the accident, a small boat with an outboard motor had passed them a few hundred yards to their left going in the opposite direction near the Maryland water line (J.A., pp. 96, 230, 237).

Aboard appellant's boat were appellant and two passengers, and aboard the Long boat were Mr. Long and six passengers, including Miss Stull (J.A., pp. 30-1, 217, 233). Appellant's boat was a eighteen to nineteen foot 1953 Chris-Craft, called a "Capri", but actually a "Riviera", since the Capri line was not manufactured under that name until 1955 (J.A., pp. 93, 102, 120, 122, 197, 209). Mr. Long's boat was a twenty foot 1956 Century Coronado, with a 250 horsepower Crusader Marine engine (J.A., pp. 93, 232). Appellant had owned and regularly used his boat for about two years prior to the date of the accident (J.A., p. 215). In June of 1962, Mr. Long had installed in appellant's boat a 230 horsepower Crusader Marine engine in place of the 120 or 131 horsepower Chris-Craft engine which originally powered it and which Mr. Long said was in "fair to poor" condition (J.A., pp. 93, 120, 215-16, 233). Prior to the day of the accident, Mr. Long had operated appellant's boat with its new engine on "shake-down" test runs for about 10 hours, and appellant himself had operated it two

or three times under normal conditions, passing over wakes in the water without losing control (J.A., pp. 129, 187-8, 216-17, 228, 233-4, 254).

On the day of the accident, both motorboats had constantly encountered wakes from other boats in the area and had done so without difficulty (J.A., pp. 218, 249). Mr. Long estimated that they had passed some 200 boats since they began their trip (J.A., p. 238). Appellee Long testified at his pre-trial deposition that at the time of the accident he saw appellant hit a "small" wake not over a foot high and then went out of control (J.A., pp. 96, 186). He said that possibly this wake was from the small motorboat that had passed shortly before, but was not certain that this was the wake involved (J.A., p. 238). He said that, while the wake he saw appellant hit was a little larger than the "slight chop" on the water, it was like others they had met in travelling downstream (J.A., p. 249). During his cross-examination of appellant, Miss Stull's counsel was allowed, over objection, to bring out the fact that appellant had stated in a United States Coast Guard accident report filed with the Maryland Department of Tidewater Fisheries that he "hit a swell" (J.A., pp. 15, 223-7). Appellant testified that, although he was certain he was passing over wakes at the time or around the time of the accident and that he saw wakes in front of him, he could not recall that he actually struck a wake at that time (J.A., p. 223), and construed his statement in the accident report as indicating "what I thought possibly could have caused this accident, since they asked for one. I don't feel that I stated that it definitely caused the accident" (J.A., p. 227). Miss Stull's counsel nevertheless referred to the accident report in his closing argument (J.A., p. 264).

Neither appellant, nor Mr. Long, nor Mr. Jonathan Weiss, a passenger on appellant's boat, nor even Miss Stull, saw anything unusual in the water before the acci-

dent (J.A., pp. 65, 212, 220, 249). Appellant and Mr. Weiss testified that appellant was operating the boat with both hands on the steering wheel and looking forward (J.A., pp. 211, 220). Both appellant, Mr. Long, and Mr. Weiss testified that the two boats were travelling at approximately the same speed (J.A., pp. 211, 219, 252), which Mr. Long estimated was 30 miles an hour (J.A., pp. 236, 252),* and appellant estimated was between 30 and 35 miles per hour (J.A., p. 94) or around 30 miles per hour (J.A., p. 221), which he said was consistent with the speed of the boats in the area (J.A., p. 222). Mr. Edward Nabb, the expert testifying for Miss Stull, stated that, if all the boats in the area had been travelling at 30 to 35 miles an hour, this would be a dangerous situation, but if there were a string of boats going downstream at 30 to 35 miles per hour, it was better for appellant and Mr. Long to maintain their relative position (J.A., pp. 109-10). Neither he nor Mr. Hildebrand, the expert testifying for Mr. Long, could see that the boats had violated any rule of the road (J.A., pp. 117-18, 201). Mr. Hildebrand stated that their speed was not excessive and that they were not overpowered (J.A., pp. 200-1). Both experts admitted that the accident might have happened for reasons other than striking a wake, such as colliding with a submerged object, of which there are "many" in the Potomac River and which cannot always be seen (J.A., pp. 124-5, 205-7). As to this latter possibility, Mr. Long, who recovered appellant's boat, testified that its rudder was missing, but he could not determine whether it had been torn away in the accident or during the salvage operation (J.A., p. 251). Mr. Hildebrand said that if a boat hit a log hard enough to capsize, its occupants would know about it, but not if

* Appellee Long testified that his boat could operate at a maximum of 4000 revolutions per minute (J. A., p. 247). He testified he was operating at 2800 r.p.m. at the time of the accident (J. A., p. 247, 252). In his deposition he stated he was operating at between 2800 and 3400 r.p.m., but at trial he said that the resulting speed would depend on the load on his boat and that 3500 r.p.m. would probably give 33 miles per hour (J. A., p. 252).

the log were far enough beneath the surface that it broke or damaged the rudder (J.A., pp. 206-7). In this connection, Mr. Weiss stated he heard no sudden noise when appellant's boat went out of control (J.A., p. 212).

In answer to a hypothetical question asking, over appellant's objection, his opinion as to the cause of the accident (J.A., pp. 96-7), Mr. Nabb stated that he believed the "accident was caused by the boats traveling at a speed greater than was safe in relatively well-populated waters", together with the fact that appellant's boat had been re-powered with a larger engine than it had originally and that the Long boat was in a "dangerous position" in comparison to appellant's boat (J.A., pp. 100-1). He believed that a wake one foot high should have been observed "at least 100 yards" before it reached appellant (J.A., p. 101), and "an experienced driver, in my opinion, would have anticipated wakes in a crowded area and would have reduced his speed or adjusted the direction of his boat to meet those wakes" (J.A., p. 130). On cross-examination, however, he admitted that, by the wording of the hypothetical question, he did not consider the direction the wake was moving or the angle at which it met appellant's boat (J.A., pp. 110-11) and admitted that the angle at which a boat meets a wake is an important factor (J.A., p. 111). He further stated that "it is possible to have a wake created ahead of you less than 100 feet, and of course if it was created less than 100 feet, or 100 yards, which was my testimony, you of course could not see it" (J.A., pp. 111-12). He agreed that it was possible for a wake to be created almost immediately in the path of a boat by another boat in the area and that, if so, the operator would have no opportunity to see it or to take evasive action (J.A., p. 112). It was his opinion that if there had been no wake, there would not have been an accident (J.A., pp. 112-13).

Mr. Hildebrand stated that the size of a wake depends on the proximity and speed of the boat creating it (J.A.,

p. 205), and Mr. Long stated that a wake decreases with distance (J.A., p. 238). Mr. Hildebrand thought it was doubtful that a small wake would cause either of the boats involved to go out of control (J.A., p. 204).

Mr. Long testified that he was the operator of a marina and boat maintenance yard in the District of Columbia and had operated the marina for eight years (J.A., pp. 231-2). He had about 17 years' experience with boat repair work, and had raced boats, run large boats, work boats, tug boats, pleasure craft, and brings boats from the Chesapeake Bay to the Washington area (J.A., p. 232). He stated he was familiar with the Potomac River in the area of the accident, that he had owned his boat since 1957, and had operated it 800 hours before the accident (J.A., p. 232). Appellant testified he managed a restaurant in the District of Columbia and had owned his boat for about 2 years, operating it "as much as possible", using it every evening, if possible, from the time he first purchased it into the early fall of 1961, since his restaurant was only a block from where his boat was docked (J.A., p. 215). He had owned no other boat but had operated other boats for approximately 3 or 4 years (J.A., pp. 215, 221).

Appellant testified that at the time of the accident Mr. Long was in a good position to see him (J.A., pp. 228-9), and appellee Long stated he could see and was watching appellant's boat at that time (J.A., pp. 253, 258). Mr. Nabb, the expert witness for Miss Stull, testified that, on the basis of the hypothetical question propounded to him, appellant's boat, being in front, could not have been the overtaking boat. He stated that "if the boat in front, the lead boat, were to suddenly decelerate, slow down, it would certainly be the responsibility of the following boat to adjust its course" (J.A., p. 113).

Appellant testified that, when his boat went out of control, he made some attempt to control it by a slight turn of the wheel and by reaching for the throttle (J.A., p. 220).

He turned the wheel to the left to avoid the accident, but could not recall whether he was able to touch the throttle (J.A., p. 221). Mr. Weiss, a passenger in appellant's boat sitting in the front seat opposite appellant (J.A., p. 210), testified that, when the boat went out of control, appellant was trying to pull his boat back left and had cut completely back on the throttle (J.A., p. 211).

Although, as indicated above, Mr. Nabb originally stated that Mr. Long was in a dangerous position relative to appellant's boat (J.A., p. 101), Mr. Nabb and Mr. Hildebrand both later agreed that Mr. Long was operating his boat in a reasonably safe position (J.A., p. 119-20, 201). Mr. Long testified that when he saw appellant's boat swerve to the right, he immediately made a right turn and that his boat started to turn (J.A., pp. 186, 247, 249). On cross-examination, however, he stated that, at the time appellant's boat went out of control, it was between 100 and 150 feet to his left (J.A., p. 256). He did not pull back on his throttle immediately, but thought it best to turn his wheel hard to the right (J.A., p. 257). Although Mr. Nabb stated that quick deceleration and turning at the same time will cause a boat to overturn (J.A., p. 126), Mr. Long testified that throttling back would have brought his boat to an almost immediate stop (J.A., p. 255) or allowed it to drift forward at a slower rate of speed (J.A., p. 256).

There was a short period of time, at least two or three seconds, during which the two boats moved to within 20 feet of each other, that Mr. Long stood "petrified" and before he began to make his turn to the right (J.A., pp. 257, 259). He then knew appellant was obviously out of control and was in no position to turn (J.A., p. 257).

On the facts as stated, appellee Stull brought suit against appellant on the law side of the District Court, alleging that appellant's negligence caused her injury (J.A., p. 2). Appellant filed a third-party complaint against appellee Long, averring that the collision between their boats was

caused by his sole or concurrent negligence (J.A., p. 6). Subsequently, appellee Stull filed a complaint against appellee Long (J.A., p. 8), and appellant and appellee Long cross-claimed against each other (J.A., pp. 9, 11).

Following pre-trial discovery during which, over appellant's objection, his Coast Guard accident report was ordered produced (J.A., pp. 4-5, 13-14), the case proceeded to trial without a jury before Judge Matthews, and the evidence above discussed was presented.

Although not having included it in his pre-trial statement, counsel for Miss Stull urged that the case be considered under the doctrine of *res ipsa loquitur*, but Judge Matthews refused to allow this on the ground that the application was late (J.A., p. 194).

On the basis of the evidence presented, Judge Matthews found appellant to have been negligent and appellee Long not to have been negligent (J.A., pp. 283-4).

In her Findings of Fact and Conclusions of Law, (J.A., pp. 17-19), Judge Matthews found that appellant "proceeded through the area without taking corrective action, such as reducing his speed, which a reasonably prudent man would have taken under the same circumstances. His boat hit a wake and went out of control and veered to the right, striking defendant Long's boat". She further found that "defendant Long in the exercise of due care was unable to avoid the collision".

On the issue of damages, Miss Stull testified that when the two boats collided, she was thrown into the water, and, by contact with the propeller of appellant's boat, suffered a two and a half inch laceration at the base of her thumb, cutting the tendon and digital nerve so that blood poured down her arm and she could see clear to the bone of her left hand (J.A., pp. 34, 147). She also suffered a large bruise and blood clot on her left thigh, but, as to this, she incurred only a doctor's bill of \$10.00 and lost only about

two days from work (J.A., pp. 84-6). The injury for which she sues here is the cut at the base of her thumb. As to this, her counsel said in his opening statement, "It is the pain, discomfort and loss of function that we are here for" (J.A., p. 22).

Appellee Long testified that appellant's boat was upside down with the propeller in the air when it struck his boat (J.A., pp. 247-8, 250, 255). Of the passengers on his boat, he said only Miss Susan Colburn, sitting on the front deck, flew out over appellant's boat, and he did not see any of his passengers come in contact with appellant's boat, either as they went over the side or after they were in the water (J.A., p. 255).

Upon being lifted from the water, Miss Stull testified she was taken to the hospital at Fort Belvoir where her injury was cleansed and the tendon and nerve were sewed (J.A., pp. 35-6). Her own doctors referred her to Dr. Douglas R. Koth, a specialist in surgery in private practice since 1960, who first saw her on August 17, 1962 (J.A., pp. 36, 147-8, 158). Dr. Koth initially removed the sutures from the wound, gave Miss Stull a tetanus shot, and then referred her to Dr. Buchanan, a physical therapist (J.A. pp. 37, 148).

In continuing her visits to Dr. Koth over the next three or four months, Miss Stull complained of pain, and, although Dr. Koth had seen no need to open the wound and clean it out when he first saw her (J.A., p. 159), he took x-rays and, in May of 1963, performed a biopsy to determine whether there was any foreign matter that could be removed (J.A., pp. 37, 148-9). In August of 1963, he removed a neuroma* from the area of the wound and put the

*Dr. Koth described a neuroma as being "a mass located at the point of either injury or—injury, say in severing or squashing a nerve, mashing it . . . which is formed of a wild growth of the nerve ends so that they do not connect with each other but actually, under the microscope, run in all different directions and therefore you have this lump formed." (J.A., p. 149)

nerve back together, removing also scar tissue to allow better healing and to enable Miss Stull to have more pad over the nerve (J.A., pp. 38, 149-50).

Both Miss Stull and Dr. Koth claimed that her digital nerve had been cut (J.A., pp. 35-6, 148). On the other hand, Dr. James Peter Murphy, a neurosurgeon and specialist in the diagnosis and treatment of physical diseases of the nervous system (J.A., pp. 238-9), testified that on July 29, 1965, by use of the objective neurothermometer test which measures skin conduction, that is, skin perspiration controlled by nerve supply, he could find no evidence that Miss Stull's nerve had been cut or was injured at that time (J.A., pp. 241-2, 244, 245).

Following the operation to remove the neuroma, Dr. Koth referred Miss Stull to Dr. Lewis, a neurologist, who prescribed vitamins to strengthen the tendon in her thumb, but her thumb did not improve (J.A., p. 38). Dr. Koth continued to refer her to Dr. Buchanan, the physical therapist (J.A., p. 150).

At the time of trial, Miss Stull was 23 years old with a life expectancy of 55.5 years, was unmarried, and was employed as a clerk-stenographer with the United States Air Force at the Pentagon (J.A., pp. 29-30, 184, 304). At her deposition in July of 1964, Miss Stull stated that she did not have trouble with her thumb every day at work, but that pain came on around noon, and that she felt pain infrequently at night (J.A., pp. 59, 78, 261). At the trial about a year and four months later, however, she said her thumb had become worse and that she felt pain virtually all the time, that her job required more typing than it used to do that her pain occurs right away at the beginning of the day (J.A., pp. 59, 78, 80). She claimed she holds her left thumb up in the air while typing to keep it from being bumped by the lower keys when typing numbers, although, being right-handed, she does not now use her left thumb to move the space bar (J.A. pp. 41, 79-80, 163), and she uses an electric

typewriter (J.A., p. 79). She testified that this habit puts a painful strain on her left hand (J.A., p. 41), which she attributes to pain, not to a feeling of insecurity (J.A., p. 78), although Dr. Koth advised her to practice keeping her thumb down (J.A., pp. 175-6). She claimed this habit interferes with her typing rhythm and that her typing speed has decreased by 20 words per minute (J.A., pp. 41, 43, 78). After typing for about an hour, she says she has to stop to rest (J.A., p. 41). Furthermore, she works in a "very secure" area at the Pentagon requiring her to tear up all papers and place them in "burn bags", which causes pressure on her thumb (J.A., p. 41-2).

At home, she states she has trouble ironing, washing her clothes by hand, washing her hair, holding an orange or apple to peel it, and fastening her clothes in getting dressed (J.A. p. 42-3). She further feels pain in holding school books while standing up on the bus on her way from work to night school (J.A., pp. 43, 58), and that her thumb constantly aches when the weather is cold or when it rains or because of air conditioning (J.A., p. 43). Dr. Koth recommended that she wear a glove to help this pain, but she said she cannot do this when she types (J.A., p. 43). She further stated she felt pain while she was sitting reading, and that "many times" the pain causes her to awaken at night because she is sleeping on her left hand (J.A., pp. 43-4).

Miss Stull then explained the medical expenses she incurred and her time lost from work (J.A., pp. 48-53, 81-2; J.A., pp. 285-303), which constitute her special damages of \$1,564.70 found by Judge Matthews (J.A., p. 18).

Dr. Koth testified that Miss Stull's wound had healed, as had the muscles that were cut to reach the nerve, and that the joint in her thumb had not been injured (J.A., pp. 150, 160, 167). As indicated, Dr. Murphy found no evidence that the nerve had been cut or of nerve injury at the time of his examination (J.A., pp. 244, 245). Dr. Koth nevertheless

testified that Miss Stull's thumb has a 17 percent limitation of function in adduction, abduction, and flexion (J.A., pp. 151-2)*. At the time he removed the neuroma, Dr. Koth found also that the muscle pad at the base of her thumb had become smaller because of atrophy of the muscle while her thumb was in a splint during the healing process (J.A., p. 150). In considering the factors of pain and strength in relation to Miss Stull's left hand, Dr. Koth concluded she has a 25 percent limitation of function (J.A., pp. 152-3, 181). Dr. Murphy stated that there was a 25 percent limitation of function as to the thumb alone in abduction and flexion (J.A., pp. 240-2), but he found no limitation in adduction, that is, bring the thumb toward the hand (J.A., p. 241).** He also found no difference in the thickness of the pad of her left thumb compared with that of her right thumb (J.A., p. 240). Both doctors agreed that the limitation found was permanent (J.A., pp. 153, 243).

Dr. Koth testified that Miss Stull's pain was of two types: first, an acute "pinpoint" pain in the immediate area of the wound, an area less than one-eighth of an inch in diameter, which occurs whenever anything strikes or is pressed hard against the area, as when grasping heavy objects or objects large enough to touch the area (J.A., pp. 78, 80, 151, 165-6, 177, 178-9), but not so sensitive that it hurts when she rubs or massages the area (J.A., pp. 165, 271), and, secondly, a deep, aching type of pain which Dr. Koth attributed to an arthritis-like neuralgia associated

*Abduction is movement of the thumb out from the midline of the hand; flexion is bending the thumb; adduction is bringing the thumb toward the index finger, as in grasping (J. A., pp. 241, 151-2). Dr. Koth referred to abduction as "opposition" (J. A., p. 151).

**This is corroborated by Miss Stull's actions during the trial, as in holding chalk and demonstrating she could move her thumb to just below her little finger (J.A., pp. 56, 271). Movement of the thumb *away* from her hand (abduction), in which Dr. Murphy found a 15 percent limitation of function (J. A., pp. 240-1), is a rarely used function of the thumb, particularly for Miss Stull who, being right handed, would more likely use her right thumb for such a movement.

with the nerve injury and to myalgia arising from muscle strain from which Miss Stull suffers during inclement weather and when in an air-conditioned room (J.A., pp. 151, 154-5). Dr. Koth prescribed analgesics to relieve the pain and advised her to wear a glove or to put padding over the base of her thumb (J.A., pp. 155, 157, 179). In February of 1964, Dr. Koth considered eliminating the pain by cutting the nerve, but as of April of that year, he changed his mind because the resulting anesthesia would be a greater disability than the pain and, although the same pain continued, Miss Stull was regaining feeling in her thumb (J.A., pp. 157, 182). Dr. Koth testified that Miss Stull's pain varied in intensity and was not constant in the sense that it existed 24 hours a day (J.A., pp. 166-7, 180).

Dr. Koth saw Miss Stull five times in 1962, eleven times in 1963, twice in 1964, and twice in 1965 (J.A., p. 162). Appellant's counsel requested that, for the purpose of cross-examination, he be allowed to inspect all of Dr. Koth's notes and records in his possession at the trial (J.A., pp. 168, 170), but, although Dr. Koth admitted that the notes and records were pertinent to the case (J.A., p. 172), Judge Matthews denied this request and allowed appellant to see only those notes which Dr. Koth said he used for his direct testimony (J.A., pp. 170-2).

Cross-examining on the basis of the notes he was allowed to see, appellant's counsel brought out that Dr. Koth's note in reference to September 1, 1962, within a month after the accident, stated that Miss Stull was "Doing well, discharged, healed in full range of motion" (J.A., p. 172).

The note of September 20, 1963, read: "Return of function satisfactory, but still has stiffness and residual tenderness, certain motions, especially those putting stress on the free nerves, otherwise the wound is well healed" (J.A., pp. 173-4).

The note dated April 27, 1964, was that "pain still persists, only now not just with stretching and pressure over

the digital nerve but also at rest of times. There seems to be full range of motion but limited in strength and by pain. There is hypesthesia over the medial aspect of the thumb but not complete loss. Do not recommend transection of nerve. Referred to neurologist for evaluation" (J.A., p. 174).

Finally, the note dated August 13, 1965, about three months before the trial, stated: "Pain and aching sensation in that left thumb. And she was suspicious that possibly another tumor (neuroma) was forming. On examination there was no evidence of any neuroma at this time. However, there is still very little subcutaneous tissue over the digital nerve in this area and pressure on this digital nerve still causes a great deal of discomfort. She was instructed that her lifting of heavy things and dropping them was due to the fact that she had to increase her grasp, thereby pressing whatever she was lifting against this nerve causing her the pain causing her to drop it. She was advised in these situations to wear some padding over this area. Actually, the scars here are healed very well and they were soft and not causing a particular problem. The cosmetic result is rather excellent. There was a problem in that she has gone into the habit of holding that thumb in an elevated manner and not using it. This puts a strain and a stretch on the nerves and may cause some of the aching at the end of the day's typing when she no longer uses this thumb for the space bar, and so on. She was advised to continue to practice holding her thumb and her hand in a position of function which may take any stress off this nerve. There is no surgery indicated at this time or further physical therapy indicated at this time" (J.A., pp. 175-6).

Despite her pain, Miss Stull has continued at her same job where her performance is rated uniformly satisfactory (J.A., p. 57). Her civilian employer in her office, Mr. John Ward, testified that, while the documents Miss Stull types contain 25 to 30 percent numbers and that after an

hour or two her hand appears to bother her so that she complains sometimes and massages her thumb (J.A., p. 134), her performance at work is completely satisfactory (J.A., pp. 135, 139). He admitted that her typing ability appears to be normal at least during the early part of the day, but after a long period of time, she tends to slow down (J.A., p. 139). Miss Joan Concaugh, Miss Stull's supervisor in the office, testified that while Miss Stull cannot perform her job as properly as she did before her injury (J.A., pp. 140-1), she has not reported to anyone that Miss Stull is not doing adequate work (J.A., p. 142). Miss Stull testified that she received two in-grade promotions since the accident and is attending night school at the University of Maryland, taking sophomore English (J.A., p. 57).

Following closing arguments of counsel (J.A., pp. 263-83), Judge Matthews took the matter of damages under advisement (J.A., p. 284). On November 23, 1965, she ordered that Miss Stull recover from appellant damages in the sum of \$21,000 (J.A., p. 19).

On January 13, 1966, appellant noted this appeal (J.A., p. 19).

STATUTES AND REGULATIONS INVOLVED

No statute or regulation is involved in this appeal except with regard to Question Presented No. 6. The relevant portion of the statutes and regulations involved in that question are as follows:

A. Title 46, United States Code, Section 526l (c):

"In the case of collision, accident, or other casualty involving a motorboat or other vessel subject to this subchapter, the operator thereof, if the collision, accident, or other casualty results in death or injury to any person, or damage to property in excess of \$100, shall file with the Secretary of the Department within which the Coast Guard is operating, unless such operator is required to file an accident report with the State under section 527a (c) (6) of this title, a full descrip-

tion of the collision, accident, or other casualty, including such information as the Secretary may by regulation require." (72 Stat. 1756, September 2, 1958)

B. Title 46, United States Code, Section 527a (c) (6):

"(c) The Secretary shall establish an overall numbering system for the numbering of vessels required to be numbered under subsection (a) of this section. He shall approve any State system for numbering vessels which is submitted to him which meets the standards set forth below:

(6) The State shall require that reports be made to it of accidents involving vessels numbered by it under its numbering system, and shall compile and transmit to the Secretary such statistics on such accidents.

• • • " (72 Stat. 1754, September 2, 1958)

C. Title 46, Code of Federal Regulations, Section 173.01-10(b) and (c):

"(b) The operator(s) of the boat(s) shall prepare and submit the written report(s) to the Coast Guard Officer in Charge, Marine Inspection, nearest to the place where such accident occurred or nearest to the port of first arrival after such accident, unless such operator is required to file an accident report with a State under subsection 3 (c) (6) of the Federal Boating Act of 1958.

(c) Every written report shall contain the following information:

(11) A description of the accident (including opinions as to the causes).

• • • " (23 Fed. Reg. 10365, December 25, 1958).

D. Title 46, Code of Federal Regulations, Section 173.10-1:

"(a) The 'Boating Accident Reports' are intended to furnish the information necessary for the Coast Guard

to make findings of causes of accidents and recommendations for their prevention, and to compile information for use in making statistical reports.

(b) Except as provided in paragraph (c), individual 'Boating Accident Reports', or copies or excerpts therefrom, will not be released.

(c) 'Boating Accident Reports' may be available for additional statistical studies, on the condition that information from individual reports shall not be disclosed, and subject to prior arrangements and reasonable restrictions necessary in the carrying on of the business of the office." (23 Fed. Reg. 10365, December 25, 1958)

E. *Article 14B, Section 9 (b) and (c), Annotated Code of Maryland (1957 Ed.) (1965 Cumulative Supplement)*:

• • •

"(b) Whenever an accident involves any vessel subject to this article and results in the death, disappearance, or injury to any person, or in property damage in excess of one hundred dollars (\$100.00), the operator or operators thereof shall file, with the Department of Tidewaters Fisheries, a full description of the accident, including such information as that Department may by regulation require, within the times required in subsection (d) of this section.

• • •

(c) The report of a boating accident herein required to be made shall not, during any judicial proceeding, be referred to in any way; it shall not be subject to subpoena nor admissible as evidence in any proceeding. Subject to these restrictions, information contained in a boating accident report and any statistical information based thereon will be made available upon request for official purposes to the United States Coast Guard and any federal agency successor thereto." (Acts 1960, ch. 69, Section 2)

STATEMENT OF POINTS

1. There was not sufficient evidence in the record to support the District Court's finding that the accident herein involved was caused by negligence on the part of appellant.
2. There was not sufficient evidence in the record to support the District Court's finding that there was no concurring or contributory negligence on the part of the appellee Long in causing the accident involved.
3. The order of the District Court that appellee Stull recover the sum of \$21,000 in damages is clearly erroneous on the ground that the said sum is grossly excessive in light of the evidence of record concerning the nature and extent of appellee's injury.
4. The District Court erred in admitting the testimony of Edward H. Nabb, testifying for appellee Stull as an expert on the subject of motorboats, in which, on the basis of a hypothetical question, he expressed his opinion as to the cause of the accident, when the District Court, as trier of the facts, was equally competent to make its own conclusion on this issue and was therefore not properly assisted by such opinion.
5. The District Court erred in limiting appellant's cross-examination of appellee Stull's treating physician, Dr. Douglas R. Koth, by refusing to permit appellant to cross-examine Dr. Koth as to all his notes and records relating to his treatment of appellee.
6. The District Court erred in allowing appellee Stull to cross-examine appellant, for the purpose of impeachment, as to a statement made by him in a United States Coast Guard accident report he filed with the Maryland Department of Tidewater Fisheries, which report is, by applicable law and regulations, not to be released and not to be referred to in any way in any judicial proceeding.

SUMMARY OF ARGUMENT

1. The evidence of record does not disclose why appellant's motorboat went out of control, but, to the contrary, shows it could have done so for many reasons, such as striking submerged debris, a cause for which appellant could not be responsible. The doctrine of *res ipsa loquitur*, which the District Court for good reason held not to apply, was not applicable in any event since the accident did not presuppose that appellant was negligent. That appellant might have hit a wake and that this might have caused his boat to go out of control is not sufficient to establish his negligence, since there was no proof that appellant saw, or could have seen, such a wake in time reasonably to take evasive action.

2. Appellee Long, the operator of the motorboat with whom appellant collided and an experienced motorboat operator on the Potomac River, was watching appellant's boat at the time it went out of control when it was 100 to 150 feet away. He saw the boat go out of control and he knew appellant could not turn to avoid a collision, but yet he stood "petrified" until the two boats were only 20 feet away and, even then, chose to turn his boat to the right rather than pull back the throttle, which he admitted would have brought his boat to an almost immediate stop or allowed it to drift forward more slowly. Furthermore, the position that appellee Long's boat was in was one that he had voluntarily adopted, and the burden was upon him to adjust his speed and direction to that of appellant's craft. For these reasons, appellee Long ought to have been held solely negligent or concurrently negligent in causing the accident.

3. The award of \$21,000 in compensatory damages to appellee Stull, over twelve times the amount of her special damages, is grossly excessive in light of the actual nature and extent of the injury to her left thumb and especially

since the injury has not had any significant detrimental effect on her employment.

4. Mr. Edward Nabb, appellee Stull's expert witness on the subject of motorboats, should not have been allowed to express his opinion as to the cause of the accident on the basis of a hypothetical question asking him to do so, since the District Court, as the trier of facts, was equally competent to reach its own conclusion as to cause and could not have been assisted by such opinion, and it cannot be said that the District Court did not rely on Mr. Nabb's opinion in making its findings and conclusions.

5. Appellant should have been allowed to inspect all the notes and records of appellee Stull's treating physician, Dr. Douglas R. Koth, which Dr. Koth brought to the courtroom and which he admitted were pertinent to the case, so that appellant might cross-examine Dr. Koth to bring out matters in such notes and records tending to qualify, modify, or explain Dr. Koth's testimony on direct examination.

6. Miss Stull's counsel should not have been allowed to attempt to impeach appellant on the basis of a statement appellant made in a United States Coast Guard accident report which appellant filed, pursuant to law, with the Maryland Department of Tidewater Fisheries, since such report was privileged by Coast Guard regulations, in that it was not to be revealed, and by Maryland statute, in that it was not to be referred to in any way in any judicial proceeding; and the use of it to impeach appellant violated such privilege to the prejudice of appellant because he was required by law to state in such report his opinion as to the cause of the accident.

ARGUMENT**I. There Is Not Sufficient Evidence In The Record To Support The Finding Of The District Court That The Accident Was Caused By Negligence On The Part Of Appellant**

The evidence presented by Miss Stull to meet her burden of proving that her injuries were caused by any negligence on the part of appellant does not extend beyond proof that appellant was operating his motorboat and that it went out of control. All else is left to speculation.

For good reason, because the application was late as not having been included in Miss Stull's pre-trial statement, the District Court refused to consider her case under the doctrine of *res ipsa loquitur* (J.A., p. 194). That doctrine does not in any event help Miss Stull since her proof concerned specific acts of negligence and, as hereafter discussed, the accident was not one that presupposed negligence. *Quick v. Thurston*, 110 U.S. App. D.C. 169, 172, 290 F.2d 360, 363 (1961); *Slaughter v. D.C. Transit System, Inc.*, 104 U.S. App. D.C. 275, 276, 261 F.2d 741, 742 (1958); *China Doll Restaurant, Inc. v. MacDonald*, 180 A.2d 503, 505 (D.C. Ct. App. 1962); *Loketch v. Capital Transit Co.*, 101 U.S. App. D.C. 287, 288, 248 F.2d 609, 610 (1957); *Jaquette v. Capital Traction Co.*, 34 App. D.C. 41, 47 (1909); *King v. Davis*, 54 App. D.C. 239, 242-3, 296 Fed. 986, 989-90 (1924).

Miss Stull adduced no proof of what actually caused appellant's boat to go out of control. Both her expert, Mr. Nabb, and appellee Long's expert, Mr. Hildebrand, agreed that there were many possible causes, among which were submerged logs and debris which appellant could not have seen and which might have been far enough below the surface that they damaged his rudder without his being aware of what happened (J.A., pp. 124-5, 205-7). Miss Stull's proof to this extent is legally insufficient. *Brown v. Capital Transit Co.*, 75 U.S. App. D.C. 337, 127 F.2d 329, *cert. denied*, 317 U.S. 632 (1942); *Taylor v. Crane Rental Co.*, 103 U.S. App. D.C. 13, 254 F.2d 350 (1958);

MacMaugh v. Baldwin, 99 U.S. App. D.C. 247, 239 F.2d 67 (1956). As was said in *Bennett v. Washington Terminal Co.*, 55 App. D.C. 111, 113, 2 F.2d 913, 915 (1924):

"The presumption that the accident resulted from any one of these causes might be indulged. Where, as in this instance, the accident may have resulted from any one of a number of different causes, and in any one of a number of different ways, the court will not permit the jury to speculate as to how it occurred, and arrive at a verdict which at best would amount to a mere guess. It was incumbent upon the plaintiff to establish the negligence of the terminal company by affirmative proof."

See *Herbst v. Levy*, 279 Ill. App. 353 (1935), and *Charlton v. Lovelace*, 351 Mo. 364, 173 S.W.2d 13 (1943), involving motorboat accidents where no sufficient evidence of cause was produced. In the *Herbst* case, the Court stated:

"While it is true that defendant was in possession and control of the motor boat, he did not have control of the water in which the boat was being driven, of the objects or particles that might have been therein, nor of the currents of the lake. He might have avoided obstructions on the surface of the water, but if there were any submerged or that could not be seen, he was in no better position to discover them than was the deceased himself." (p. 364)

Miss Stull's ultimate theory is that appellant was operating his motorboat at a speed greater than was reasonable in light of his experience with its new engine and the number of boats in the area and that appellant hit a wake which he would have seen and would have been able to meet safely had he been travelling more slowly (J.A., p. 100-1). This theory rests on the recollection of Mr. Long that he saw appellant's boat hit a wake and on appellant's statement in his Coast Guard accident report that he "hit a swell." On these bases, the hypothetical

question was propounded to Miss Stull's expert witness, Mr. Nabb. Appellant charges in this appeal that the District Court committed reversible error in allowing Miss Stull's counsel to refer to the accident report and in allowing Mr. Nabb to express his opinion as to the cause of the accident. Taking Mr. Nabb's testimony as it stands, however, Mr. Nabb admitted certain crucial facts that leave Miss Stull's case in the limbo of conjecture and surmise: First, because of the wording of the hypothetical question that appellant's boat "jumped across" a wake about a foot high, Mr. Nabb admitted he did not take account of the angle at which the wake met appellant's boat and stated that the angle at which a boat meets a wake is an important factor (J.A., p. 111). Second, Mr. Nabb admitted it was possible that a wake could have been created so quickly that appellant would have been unable to see it in time to take evasive action (J.A., p. 112). Third, Mr. Nabb admitted that if there had been no wake, there would have been no accident (J.A., pp. 112-13).

These admissions reduce Miss Stull's case to no more than that appellant met a wake. Her case is therefore as defective as those in which plaintiffs have, for example, shown only that they fell on vegetable matter on the floor of a grocery store, without any proof from which the trier of facts might infer at least constructive notice. As was said recently in *Napier v. Safeway Stores, Inc.*, 215 A.2d 479, 481 (D.C. Ct. App. 1965):

"There is no evidence that any employee actually knew grapes were on the floor or that they had been permitted to remain there over such a period of time that failure to discover and remove them would amount to negligence."

See also *Orum v. Safeway Stores, Inc.*, 138 A.2d 665 D.C. Ct. App. 1958); *Brodsky v. Safeway Stores, Inc.*, 80 U.S. App. D.C. 301, 152 F.2d 677 (1945). In *Martin v. United States*, 96 U.S. App. D.C. 294, 297, 225 F.2d 945, 948

(1955), in which a child was injured by an insecurely fastened manhole cover on the grounds of the Washington Monument, this Court said:

"The appellant does not charge the United States with active negligence. There was no indication of actual notice to the appellee that the manhole cover, which had been bolted down in 1945, had become insecure. The district judge found no proof that the cover had been loose long enough before the accident to charge the Government with constructive notice of its condition, and so found as a fact that it had no such notice."

Decisive here is this Court's statement in *Brown v. Capital Transit Co.*, 75 U.S. App. D.C. 337, 338, 127 F.2d 329, 330, *cert. denied*, 317 U.S. 632 (1942), *supra*:

"If causes other than the negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence. Here the sum and substance of appellant's evidence is that an injury occurred.

"We are of the opinion that the trial court, in directing the verdict, properly took away from the jury the opportunity to guess and speculate, as they must have done to reach a verdict in this case."

In this case this same principle applies, and the District Court erred in finding for the appellee.

II. There Is Not Sufficient Evidence In The Record To Support The Finding Of The District Court That There Was No Concurring Or Contributory Negligence On The Part Of Appellee Long In Causing The Accident Involved

Appellee filed a third-party complaint and cross-claim against appellee Long, alleging that his negligence was the sole or concurring cause of Miss Stull's injury (J.A., pp. 6, 11). The evidence is not disputed that Mr. Long was watching appellant's boat when the accident occurred

(J.A., pp. 253, 258). At that time, Mr. Long testified appellant's boat was between 100 and 150 feet away. For the space of at least two or three second, or however long it took for the two boats to move from a distance of between 100 and 150 feet to within only 20 feet of each other, Mr. Long stood "petrified" (J.A., pp. 257, 259). In this period he did nothing, although he knew appellant's boat was out of control and that appellant could not turn to avoid a collision (J.A., p. 257). Even at the time he finally took action when the boats were only 20 feet apart, Mr. Long did not pull back the throttle, which he admitted would have brought his boat to an almost immediate stop or at least would have allowed it to drift at a slower speed (J.A., pp. 255, 256), but chose instead to turn the wheel to the right (J.A., p. 257).

Appellant submits that there was a significant length of time, albeit measurable in seconds, during which Mr. Long, an experienced motorboat operator on the Potomac River (J.A., pp. 231-2), could have acted, but did not; and that he failed to do what most surely would have avoided the collision.

In these circumstances, the *in extremis* doctrine is not applicable. In the exercise of due care, Mr. Long should have acted, and should have acted by throttling back, when he first observed appellant's boat go out of control and when the two boats were 100 to 150 feet apart. The experts' opinion that he was travelling a reasonable distance from appellant's boat implies their view that this distance was reasonably sufficient to allow successful evasive action if he acted promptly upon seeing appellant's boat go out of control. Any emergency that existed when the two boats were separated by only 20 feet was therefore of Mr. Long's own making, and the finding of the District Court that he acted with due care is clearly erroneous. As this Court said in *Cole v. Capital Transit Co.*, 90 U.S. D.C. 289, 290, 195 F.2d 568, 569 (1952):

"The crucial question is not what the motorman did after he was faced with the emergency of the Barnes car, but how he happened to become involved in that emergency."

See also *District of Columbia v. Tilghman*, 157 A.2d 629, 632 (D.C. Ct. App. 1960).

The District Court therefore erred in failing to find and conclude that appellee Long was not concurrently or contributorily negligent, if, in fact, it was properly established that appellant was negligent in the first instance.

It is clear that, absent negligence on the part of appellee Long, this accident would not have occurred.

III. The Order Of The District Court Awarding Damages Of \$20,000 Is Clearly Erroneous As Being Grossly Excessive

Of the injuries Miss Stull alleges she suffered as the result of the accident, namely, a bruise and blood clot on her left thigh and the injury to her left hand, the former were only temporary and caused her little medical expense and time away from work. It is the latter injury which the large award in this case presumably is intended to compensate.

Miss Stull's injury in this respect was a cut two and a half inches long at the base of her left thumb. Within a month after the accident, this wound had healed well, with full range of motion, and she was discharge by her doctor. She claims now to suffer constant pain and a 25 percent limitation of function of her left hand. For this Judge Matthews awarded her \$21,000, being over twelve times her special damages of \$1,564.70. In addition, the \$21,000 award is not discounted to present worth, with the result that, over the period of Miss Stull's life expectancy, the award, if invested, will at six percent interest return to her a total of \$90,930, for what was in effect a cut on the base of her left thumb.

At the time of trial, Miss Stull was a 23-year old unmarried clerk-stenographer with the United States Air Force. Despite her injury, she has continued with her same job where, in the opinion of her employer, her performance is completely satisfactory. To this extent, she has lost nothing.

Miss Stull is right-handed. Her injury was at the base of the thumb on her left hand and cannot therefore be said to be as damaging to her as if it had been at the same location on her right thumb.

Her complaint, basically, is pain, which she claims is constant and severe. The evidence of record, however, goes far to show the exact nature and extent of her pain and that it is not as excruciating, constant, or unavoidable as Miss Stull asserts and as Judge Matthews apparently believed.

First of all, the evidence regarding Miss Stull's injury is not without conflict or suggestion of exaggeration. It is by no means clear, for example, that her hand came in contact with the propeller on appellant's boat; that the nerve on her thumb was ever cut or is injured; or that the movement of her thumb in adduction—bringing it toward her hand as in holding a piece of chalk—is in any way affected.

Miss Stull's own doctor admitted that her pain was not constant in the sense that it continues for 24 hours, and he stated that it varies in intensity. He described her pain as being an acute pain in an area at the base of her left thumb less than one-eighth of an inch in diameter, and a dull ache caused by neuralgia and myalgia. The first kind of pain occurs when Miss Stull picks up large or heavy objects with her left hand or when anything presses hard against that particular spot. The second kind occurs after a long period of typing or during inclement weather or in air-conditioning. For these

pains her doctor prescribed analgesics and advised her to wear a glove or padding. He further urged her to avoid holding her left thumb in the air while she types, a habit which Miss Stull argued causes her strain at work, although she uses an electric typewriter and does not use her left thumb in typing or moving the typewriter's space bar.

Appellant submits that the evidence of record absolutely establishes, in light of all the circumstances of the injury, particularly its lack of any material adverse effect on Miss Stull's employment, that the award of \$21,000 is grossly excessive and that such award should be reduced to an amount which would more reasonably compensate her to the actual extent of her injury and would be more in line with cases involving similar injuries. As Judge Holtzoff stated in *Frank v. Atlantic Greyhound Corp.*, 172 F. Supp. 190 (D.D.C. 1959), reducing a jury verdict of \$30,000 to \$15,000 for a permanent knee injury:

"When it comes to the permanent injuries, there is no dispute that as a result of this accident, the plaintiff cannot bend his right knee all the way. In other words, there is some limitation of motion in that respect. This injury, however, has not prevented the plaintiff from carrying on his occupation. At about the time of the accident, he changed his employment, and this change involved a raise in his salary. He has continued in that employment and is in it at this time, apparently to the satisfaction of his employers, and evidently is likely to continue in his endeavor. From this standpoint, he has sustained no financial loss."
(p. 192)

Substantially this same circumstance exists here. See also: *Parks v. Dexter*, 100 Cal. App. 2d 521, 224 P.2d 121, 125 (1950) (permanent injury to two fingers of right hand, verdict of \$20,000 excessive); *Affett v. Milwaukee & Suburban Transport Corp.*, 11 Wisc.2d 604, 106 N.W.2d 274, 281 (1960) (permanent injury to right hand and arm, verdict of \$13,500 excessive); *St. Louis-San Francisco Ry.*

Co. v. McBride, 376 P.2d 214, 219-21 (Okla. 1962) (permanent injury to left wrist and hand, verdict of \$21,000 excessive).

IV. The District Court Erred In Admitting Expert Opinion As To The Cause Of The Accident

The only evidence by which Miss Stull attempted to support her theory of appellant's negligence was the testimony of her expert witness, Mr. Nabb, expressing his opinion, on the basis of a hypothetical question, that the accident was caused by appellant's unreasonable speed. Miss Stull's counsel, after stating the hypothetical facts, blatantly asked: "Assuming these facts, Mr. Nabb, please tell Her Honor, in your professional opinion, what the cause of the accident was" (J.A., p. 97).

Under the rule in this jurisdiction most recently applied in the strongly analagous case of *St. Lewis v. Firestone*, 130 A.2d 317 (D.C. Ct. App. 1957), this testimony is clearly inadmissible. In that case, citing several earlier decisions of this Court, the District of Columbia Court of Appeals held it was error to allow a fire inspector to give his opinion that a fire was caused by careless smoking. The Court stated:

"The rule is well established in this jurisdiction that where the trier of facts is just as competent to consider and weigh evidence as is an expert and is just as qualified to draw conclusions therefrom, it is improper to use opinion evidence. . . . No skilled training or special knowledge obtained from experience was applied in arriving at his conclusion; indeed, in the light of the facts, anyone of ordinary training and intelligence would be equally capable of an opinion. To permit such speculative opinion was in this instance to invade the province of the trier of the facts." (p. 319)

See also, on analagous facts, the following cases from other jurisdictions: *Robelen Piano Co. v. Di Fonzo*, 53

Del. 346, 169 A.2d 240, 246 (1961); *Meyst v. East Fifth Avenue Service, Inc.*, 401 P.2d 430, 438 (Alaska 1965); *Hagan Storm Fence Co. v. Edwards*, 245 Miss. 487, 148 So.2d 639, 695 (1963); *Kelso v. Independent Tank Co.*, 348 P.2d 855, 857 (Okla. 1960).

Here, as in the *Hagan Storm Fence* case, where two automobiles collided at an intersection, "There is nothing complicated about" the collision. Those who were there sufficiently elaborated the circumstances so that Judge Matthews could, without any need for expert assistance, draw her own conclusion as to cause. Applicable here is the court's statement in the *Meyst* decision, ruling inadmissible an opinion that an automobile collision would not have occurred if the driver of one of the vehicles had put out flares at the top of a hill:

"The real objection to admitting such a statement is that it was superfluous. The jury had a duty, and it was able from the circumstances of the accident as related by witnesses, to make its own determination as to the proximate cause of the accident. In making that determination, the jury would receive no assistance from the witness's conjecture as to what might have happened had the wrecker driver done things which he in fact did not do. The purpose of opinion testimony is to aid the jury in arriving at the truth, and if the testimony does not furnish such aid it should be dispensed with because it is not needed."

For this reason, the District Court erred in admitting the opinion of Mr. Nabb, and, since it is not at all clear that the District Court did not rely on Mr. Nabb's opinion in making its findings and conclusions, this error is prejudicial.

Appellee Stull may now take the position that the opinion evidence was not necessarily accepted by the District Court. If this is so, then there was no need to interject it into the case and in effect say that the Court was unable,

because of an inability to understand a simple factual situation, to render a proper decision in the absence of the superfluous and meaningless opinion, which was more properly pure conjecture or speculation. Neither a court nor an expert should base a decision upon such a foundation.

V. The District Court Erred In Limiting Appellant's Cross-Examination As To The Notes And Records Of Appellee Stull's Treating Physician

The direct testimony of Dr. Douglas R. Koth, who was Miss Stull's treating physician, suggested that her injury caused her substantial and constant pain. To the extent that the District Court allowed appellant to inspect the notes and records which Dr. Koth said he relied on, appellant was able to establish certain facts which tended to contradict Dr. Koth's testimony on direct examination. But this was as far as appellant was allowed to go, although appellant requested that he be allowed to inspect the balance of Dr. Koth's notes available in the courtroom, which Dr. Koth admitted were pertinent to the case (J.A., p. 172), and which, as appellant pointed out, might contain "things he didn't say" (J.A., p. 170). Judge Matthews refused this request and so committed prejudicial error.

The established rule in this jurisdiction, as elsewhere, is that, on cross-examination, a party may bring out matters tending to qualify, modify, or explain the witness's direct testimony. *Branch v. United States*, 84 U.S. App. D.C. 165, 171 F.2d 337 (1948); *Mintz v. Premier Cab Ass'n*, 75 U.S. App. D.C. 389, 127 F.2d 744 (1942); *Albaugh v. Pennsylvania R. Co.*, 120 F. Supp. 70, 75 (D.D.C. 1954), *aff'd*, 95 U.S. App. D.C. 82, 219 F.2d 764 (1955).

This rule is recognized by Professor Wigmore as based on the fact that, following a witness's direct examination,

"The remaining and qualifying circumstances of the subject of testimony will probably remain sup-

pressed or undisclosed, not merely because the witness frequently is a partisan, but also and chiefly because his testimony is commonly given only by way of answers to specific interrogatories . . . and the counsel producing him will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent.

"Cross-examination, then, i.e., further examination by the opponent, has for its first utility the extraction of the remaining qualifying circumstances, if any, known to the witness, but hitherto undisclosed by him." (5 Wigmore, *Evidence*, §1368, pp. 33-4 (3rd Ed. 1940)).

Judge Matthews properly held that the physician-patient privilege was no bar to appellant's request, *Chambers v. Tobin*, 118 F. Supp. 555, 558 (D.D.C. 1954); *Dani v. United States*, 173 A.2d 736 (D.C. Ct. App. 1961); 8 Wigmore, *Evidence*, §2390(2) (3rd Ed. 1940), but, for the foregoing reasons, committed prejudicial error in not granting that request as essential to appellant's cross-examination of Dr. Koth.

If, for example, the doctor's files contained notes that were contradictory to his testimony, or if his file contained reports to him from specialists to whom he had referred appellant, and they were contradictory to his testimony, appellant should have had an opportunity to bring such matters to the Court's attention to be given such weight as they deserved. A cross-examiner does not always know what response a question or an inquiry will elicit, but he should have the right fully to explore his opponent's case.

VI. The District Court Erred In Allowing Appellee Stull's Counsel To Attempt To Impeach Appellant On The Basis Of A Statement Made By Him In A United States Coast Guard Accident Report

Appellant testified that he did not recall that he struck a wake when his motorboat went out of control (J.A., p. 223). The matter of the wake was crucial to Miss Stull's theory, since her expert, Mr. Nabb, testified that if there had not been a wake, there would have been no accident (J.A., pp. 112-13).

The hypothetical question propounded to Mr. Nabb which referred to the wake was based on the testimony of appellee Long in an earlier deposition in which he said that he saw appellant hit a "small wake" not over one foot high and possibly smaller and that appellant's boat then "seemed to go out of control in the back end when it hit this wake" (J.A., pp. 96, 186). At the trial, however, Mr. Long stated that this wake was no larger than others they had met on their trip (J.A., p. 249), so his testimony does not necessarily mean he believed the wake he saw actually caused appellant's boat to go out of control.

The prejudice arising from Miss Stull's reference to appellant's accident report, in which appellant stated he "hit a swell," was therefore not only that it tended to contradict appellant's testimony that he did not recall hitting a wake at the time his boat went out of control, but the fact that he said he "hit a swell" was his opinion, which he recognized he was required to give, of the cause of the accident (J.A., p. 227). Miss Stull's counsel made full use of both these prejudicial effects in his closing argument (J.A., p. 264).

The accident report was on a United States Coast Guard form and, under the applicable law set forth in "Statutes and Regulations Involved," *supra*, was filed with the Maryland Department of Tidewater Fisheries (J.A., p. 224).

The regulations of the United States Coast Guard provide that such accident reports "will not be released" (46 C.F.R. § 173.10-1(b), *supra*, p. 18; J.A., p. 225). The Maryland statute establishing the state system under which appellant's report was filed, provides that "The report of a boating accident herein required to be made shall not, during any judicial proceeding, be referred to in any way; it shall not be subject to subpoena nor admissible as evidence in any proceeding." Article 14B, Section 9(e), *Annotated Code of Maryland* (1957 Ed.) (1965 Cumulative Supplement), *supra*, p. 18; (J.A., p. 224).

This statute and regulation speak with absolute clarity and breadth. They would seem, as appellant contended, to have barred Miss Stull's discovery of the report (J.A., pp. 4-5, 13-14), but, apart from that, they most certainly prevent her counsel from referring to appellant's statement in the report for the purpose of impeachment, and the District Court's allowing him to do so is clearly and prejudicially erroneous. Cf., *Maddox v. Wright*, 103 F. Supp. 400 (D.D.C. 1952) (income tax returns); *Orndorff v. Cohen*, 62 A.2d 794 (D.C. Ct. App. 1948) (employer reports to D.C. Unemployment Compensation Board). Cases in other jurisdictions respecting statutory privilege for accident reports are: *Stephenson v. Millers Mutual Fire Insurance Co.*, 236 F. Supp. 420 (D. Ariz. 1964); *Ehrhardt v. Ruan Transport Corp.*, 245 Iowa 193, 61 N.W.2d 696, 701-2 (1953); *Sprague v. Brodus*, 245 Iowa 90, 60 N.W.2d 850 (1953); *Irvine v. Safeway Trails, Inc.*, 10 F.R.D. 586, 587-8 (E.D. Pa. 1950); *Henry v. Condit*, 152 Ore. 348, 53 P.2d 722, 724 (1936); *Stevens v. Duke*, 42 S.2d 361 (Fla. 1949); *Ippolito v. Brener*, 89 So. 2d 650, 652 (Fla. 1956); *Lee v. Artis*, 205 Va. 343, 136 S.E. 2d 868, 870 (1964); *Haugen v. Dick Thayer Motor Co.*, 253 Minn. 199, 91 N.W.2d 585, 594-5 (1958).

The rationale for such privilege is that "The State has a justifiable interest in encouraging the individual report-

ing to make a truthful, accurate, and complete report without fear of the report subsequently being used against him in a lawsuit." *Stephenson v. Millers Mutual Fire Insurance Co.*, 236 F. Supp. 420, at 422, *supra*, citing *Ehrhardt v. Ruan Transport Corp.*, *supra*. See also 8 Wigmore, *Evidence*, § 2377, p. 761 (3rd Ed. 1940).

That Miss Stull's counsel used the report for the purpose of impeachment cannot be any less a violation of the privilege. As stated in *Ippolito v. Brener*, *supra*, 89 So.2d, at 652: "The rule should be applied where the statements made . . . are offered for impeachment, as well as where offered as evidence in the case in chief. No logical reason exists to distinguish the situation."

It thus is clear that appellant's statement in the accident report was subject to the privilege under the Coast Guard regulation that the report not be released and under the Maryland statute that it not be referred to in any way in any judicial proceeding; and that the District Court caused prejudicial error when it allowed Miss Stull's counsel to use it as he did.

CONCLUSION

For the above reasons, appellant urges that the judgment of the District Court be reversed.

Respectfully submitted,

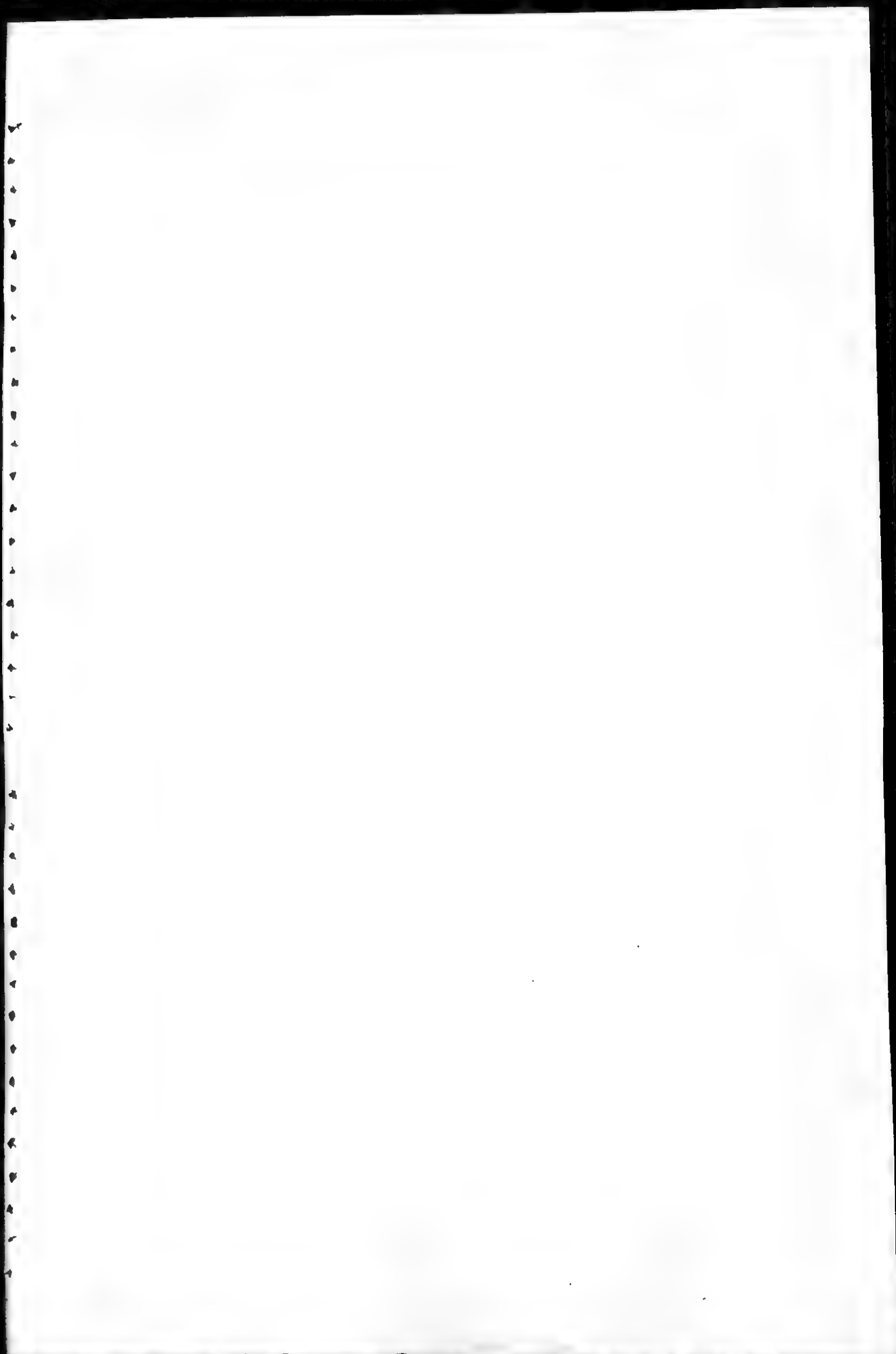
JAMES C. GREGG

JAMES F. BROMLEY

1625 K Street, N.W.

Washington, D.C. 20006

Attorneys for Appellant



APPENDIX

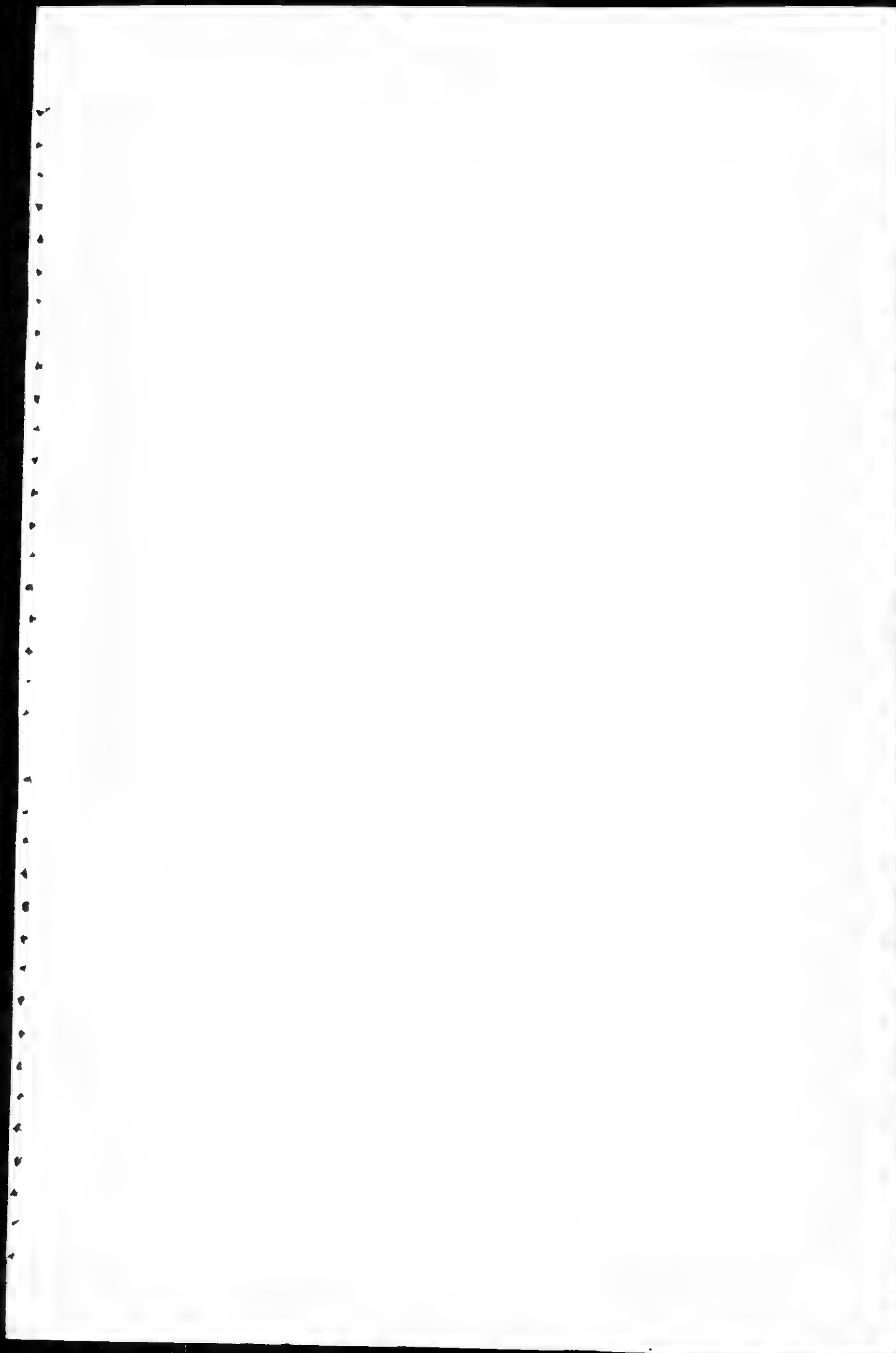


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IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20113

ROBERT I. ENGLE, *Appellant*,

v.

EMOGENE I. STULL, AND THOMAS LONG, *Appellees*.

JOINT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2892-63

EMOGENE I. STULL, 323 South Veitch Street,
Arlington, Virginia

v.

ROBERT I. ENGLE, 729 - 9th Street S.W.
Washington, D. C.

Complaint
(Negligence)

1. Jurisdiction is based on Section 11-305, 11-306 and 49-301 D. C., 1961 Ed. and 46 U.S.C. § 740.
2. On or about August 12, 1962, on the Potomac River, in the State of Maryland, approximately one mile south of Marshall Hall, Maryland, the defendant, Robert I. Engle, carelessly and negligently operated his motorboat causing it to collide with and strike a boat, owned and operated by one Thomas Long, in which the plaintiff was a passenger.
3. The defendant had exclusive control and management of his aforementioned motorboat.
4. As a result of the defendant's carelessness and negligence, the plaintiff has suffered and will continue to suffer serious, painful and permanent injuries to her body, and plaintiff has suffered, and will continue to suffer, from mental anguish and nervousness. As a further result, plaintiff has expended, and will continue to expend, large sums of money for hospitalization and medical care and has been unable, and will continue to be unable to follow her usual occupation in the future.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of fifty thousand dollars (\$50,000) plus interest and the cost of this suit.

SISK & CRAMER
McLachlen Bank Building
10th and "G" Streets N.W.
Washington 1, D. C.
393-7430

Answer of Defendant

FIRST DEFENSE

The Complaint herein fails to state a cause of action against this defendant upon which relief may be granted.

SECOND DEFENSE

1. This defendant neither admits nor denies the allegations contained in Paragraph 1 of the Complaint since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

2. This defendant admits the occurrence of the collision and denies all allegations of carelessness and negligence contained in Paragraph 2 of the Complaint.

3. This defendant admits that he was operating one of the vessels involved in the collision and denies the remaining allegations contained in Paragraph 3 of the Complaint.

4. This defendant denies all allegations of negligence and carelessness contained in Paragraph 4 of the Complaint and neither admits nor denies each and every remaining allegation since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

WHEREFORE, the defendant having fully answered the Complaint prays that the same be dismissed with costs against the plaintiff.

MACLEAY, LYNCH, CHANNING &
BERNHARD

By:
1625 K Street, N.W.
Washington 6, D. C.
Attorney for Defendant

**Motion to Compel Production of Documents for Inspection
and Copying**

The plaintiff here moves the Court to compel the defendant to produce and exhibit to the plaintiff's attorney, for the purpose of inspection and copying, all copies of reports on the accident in question that were made to the United States Coast Guard and to the Maryland Tidewater Fisheries Commission.

SISK & CRAMER
M. MICHAEL CRAMER
McLachlen Bank Building
Washington 1, D. C.
393-7430

**Opposition to Motion to Compel Production of Documents for
Inspection and Copying**

Comes now the defendant and opposes the Motion for producing copies of reports made to the United States Coast Guard and Maryland Tidewater Fisheries Commission. The grounds for this Opposition are set forth as follows:

- (1) The reports are required by law and are privileged.

(2) If the reports are a matter of public record and not privileged, then plaintiff may secure copies of such reports from the United States Coast Guard or from Maryland Tidewater Fisheries Commission.

(3) And for such other reasons as may be set forth during the oral argument of this Motion.

MACLEAY, LYNCH, CHANNING &
BERNHARD
1625 K Street, N.W.
Washington, D. C.
Attorneys for Defendant

Order

This matter came on for hearing on July 27, 1964, on the plaintiff's Motion to compel defendant to produce copies of statements given to the United States Coast Guard. Upon consideration of the Motion, the Points and Authorities filed in support thereof, and opposition thereto, it is, by the Court, this 30th day of September, 1964,

ORDERED, that the plaintiff's Motion to compel production of documents named in the instant Motion is hereby granted, and the defendant is compelled to produce copies of the said documents and present them to the plaintiff's attorney.

/s/ JOSEPH C. MCGARRAGHY
Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2892-63

EMOGENE I. STULL, 323 South Veitch Street,
Arlington, Virginia, *Plaintiff*

v.

ROBERT I. ENGLE, 729 - 9th Street, S.W., Washington, D. C.
Defendant and Third Party Plaintiff

v.

THOMAS LONG, T and Water Streets, S.W.,
Washington 24, D. C., *Third Party Defendant*

Third Party Complaint

1. Plaintiff has filed a Complaint against the defendant, Robert I. Engle, copy of which is attached hereto and marked Exhibit B.

2. Plaintiff Emogene I. Stull has alleged in said Complaint that on or about August 12, 1962 on the Potomac River in the State of Maryland, the defendant Robert I. Engle, carelessly and negligently operated his motor boat causing it to collide with and strike a boat owned and operated by one Thomas Long in which plaintiff was a passenger.

3. The aforesaid Complaint further alleges plaintiff, Emogene I. Stull, suffered injuries and damages as a result of the carelessness and negligence of the defendant Robert I. Engle.

4. The defendant, Robert I. Engle, avers that the collision referred to in the Complaint was caused by the sole negligence or concurrent negligence of the third party defendant Thomas Long in the operation of the motor boat in which plaintiff was a passenger.

WHEREFORE, the defendant and third party plaintiff Robert I. Engle demands judgment of the Third Party Defendant, Thomas Long, for all sums that may be adjudged against this defendant or for a contribution of a pro-rata share thereof.

MACLEAY, LYNCH, CHANNING &
BERNHARD

By:

CHARLES E. CHANNING, JR.

1625 K Street, N.W.

Washington 6, D. C.

Attorneys for Defendant and

Third Party Plaintiff

Robert I. Engle

JURY TRIAL DEMANDED.

Answer of Third Party Defendant

FIRST DEFENSE

The third party complaint fails to state a claim upon which relief may be granted to the third party plaintiff.

SECOND DEFENSE

1. Third party defendant, Thomas Long, admits the jurisdiction of the Court; and that at the time and place set forth in the complaint and third party complaint an accident occurred involving boats owned and operated by the third party plaintiff and third party defendant, respectively.

2. Third party defendant denies that he was careless or negligent, as alleged in the third party complaint.

3. Third party defendant is without knowledge or information sufficient to form a belief as to the alleged in-

juries, losses and damages arising out of the aforesaid accident, and demands strict proof thereof.

4. Third party defendant denies all allegations of the complaint not specifically admitted or denied herein.

THIRD DEFENSE

Third party defendant alleges that the accident and resulting injuries, losses and damages, if any, was caused by the sole negligence of the third party plaintiff, Robert I. Engle.

CARR, BONNER, O'CONNELL,
KAPLAN & SCOTT

LAWRENCE E. CARR, JR.
*Attorney for Third Party
Defendant*
1001 Connecticut Avenue, N.W.
Washington, D. C.
NAtional 8-1177

Complaint of Plaintiff Against Third Party Defendant

1. On or about August 12, 1962, on the Potomac River in the State of Maryland, approximately one mile south of Marshall Hall, Maryland, a collision occurred between a motor boat operated by defendant Robert I. Engle and a motor boat operated by defendant Thomas Long. At the time of the accident plaintiff was a passenger in defendant Long's boat. The plaintiff avers that this accident was caused by the negligence of defendant Robert I. Engle or the negligence of defendant Thomas Long, or the negligence of both of them, and requests that damages be awarded against either or both defendants who may be liable for the plaintiff's serious, painful, and permanent injuries.

WHEREFORE, plaintiff demands judgment against either or both of the defendants in the amount of \$50,000 plus interest and the costs of this suit.

SISK & CRAMER

M. MICHAEL CRAMER
McLachlen Bank Building
Washington, D. C. 20001
393-7430

**Answer and Cross-Claim of Defendant, Thomas Long, to
Complaint of Plaintiff Against Third Party Defendant**

ANSWER

FIRST DEFENSE

The complaint of plaintiff against third party defendant fails to state a claim upon which relief may be granted to the plaintiff.

SECOND DEFENSE

1. Defendant, Thomas Long, admits the jurisdiction of the Court; and that at the time and place set forth in the complaint of plaintiff against third party defendant an accident occurred involving boats owned and operated by the defendants, respectively.

2. Defendant, Thomas Long, denies that he was careless or negligent, as alleged in the complaint of plaintiff against third party defendant.

3. Defendant, Thomas Long, is without knowledge or information sufficient to form a belief as to the alleged injuries, losses or damages sustained by the plaintiff and demands strict proof thereof.

4. Defendant, Thomas Long, denies all allegations of the complaint of plaintiff against third party defendant not specifically admitted or denied herein.

THIRD DEFENSE

Defendant, Thomas Long, alleges that the accident and resulting injuries, losses and damages, if any, was caused by the sole negligence of the defendant, Robert I. Engle.

CROSS-CLAIM

For a cross-claim to the above cause of action the defendant, Thomas Long, alleges as follows:

1. That if the injuries, losses and damages alleged to have been sustained by the plaintiff as a result of the boating accident that occurred at the time and place set forth in the complaint of plaintiff against third party defendant, with the result of negligence, that said negligence was solely that of the co-defendant, Robert I. Engle.

WHEREFORE, defendant, Thomas Long, demands judgment over and against defendant, Robert I. Engle, for indemnification or contribution, if any, of any and all sums adjudged against said defendant, Thomas Long, in favor of the plaintiff.

CARR, BONNER, O'CONNELL,
KAPLAN & SCOTT

By
LAWRENCE E. CARR, JR.
Attorney for Defendant,
Thomas Long
1001 Connecticut Avenue, N.W.
Washington, D. C. 20036
National 8-1177

**Answer of Defendant Robert I. Engle to Amended Complaint
and Cross-Claim Against Defendant Thomas Long**

FIRST DEFENSE

The Amended Complaint herein fails to state a cause of action against this defendant upon which relief may be granted.

SECOND DEFENSE

This defendant admits the occurrence of the collision and denies all allegations of negligence.

This defendant neither admits nor denies the allegations pertaining to the injuries and damages allegedly sustained by the plaintiff since he is without sufficient knowledge or information to form a belief concerning the truth of said allegations.

WHEREFORE THE defendant Robert I. Engle having fully answered the Amended Complaint prays that the same be dismissed with costs against the plaintiffs.

CROSS CLAIM AGAINST DEFENDANT THOMAS LONG

The defendant Robert I. Engle avers that the injuries and damages if any sustained by the plaintiff Emogene I. Stull were caused by the sole negligence or concurrent negligence of the defendant Thomas Long in the operation of defendant Long's boat.

WHEREFORE, the defendant Robert Engle demands judgment of the defendant Thomas Long for all sums which may be adjudged in favor of the plaintiff Emogene I.

Stull against this defendant or for a contribution of a pro-rata share thereof.

MACLEAY, LYNCH, CHANNING &
BERNHARD

By:

CHARLES E. CHANNING, JR.
1625 K Street, N.W.
Washington 6, D. C.
*Attorneys for Defendant
Robert Engle*

**Answer of Defendant Robert Engle to Cross-Claim of
Defendant Thomas Long**

FIRST DEFENSE

The Cross Claim of Defendant Thomas Long against Defendant Robert Engle filed herein fails to state a cause of action against this defendant upon which relief may be granted.

SECOND DEFENSE

The defendant Robert I. Engle denies that plaintiff's injuries were caused by the sole negligence of the defendant Robert Engle.

WHEREFORE, THE defendant Robert I. Engle having fully answered the Cross Claim of Defendant Thomas Long prays that the same be dismissed with costs against the cross claimant Thomas Long.

MACLEAY, LYNCH, CHANNING &
BERNHARD

CHARLES E. CHANNING, JR.
1625 K Street, N.W.
Washington 6, D. C.
*Attorneys for Defendant
Robert Engle*

Answer of Defendant, Thomas Long, to Cross-Claim**FIRST DEFENSE**

The Cross Claim of defendant, Robert I. Engle, fails to state a claim upon which relief may be granted to said defendant and cross claimant.

SECOND DEFENSE

1. Defendant, Thomas Long, denies all allegations of negligence set forth in the Cross Claim filed by defendant, Robert I. Engle.

2. Defendant, Thomas Long, denies all allegations of the Cross Claim not specifically admitted or denied herein.

THIRD DEFENSE

Defendant, Thomas Long, alleges, in the alternative, that if the injuries, losses and damages alleged to have been sustained by the plaintiff were the result of negligence, that said negligence was solely that of the co-defendant and cross-claimant, Robert I. Engle.

CARR, BONNER, O'CONNELL
KAPLAN & SCOTT

LAWRENCE E. CARR, JR.
Attorney for defendant—
Thomas Long
1001 Connecticut Avenue, N.W.
Washington, D. C.
NAtional 8-1177

Production of Document

Pursuant to the order herein for the production of report to U. S. Coast Guard, defendant attaches a copy herewith, without waiving any objections to the admission

of such document at the trial of this case, and without waiving any objections to any use of that document or its contents at the trial.

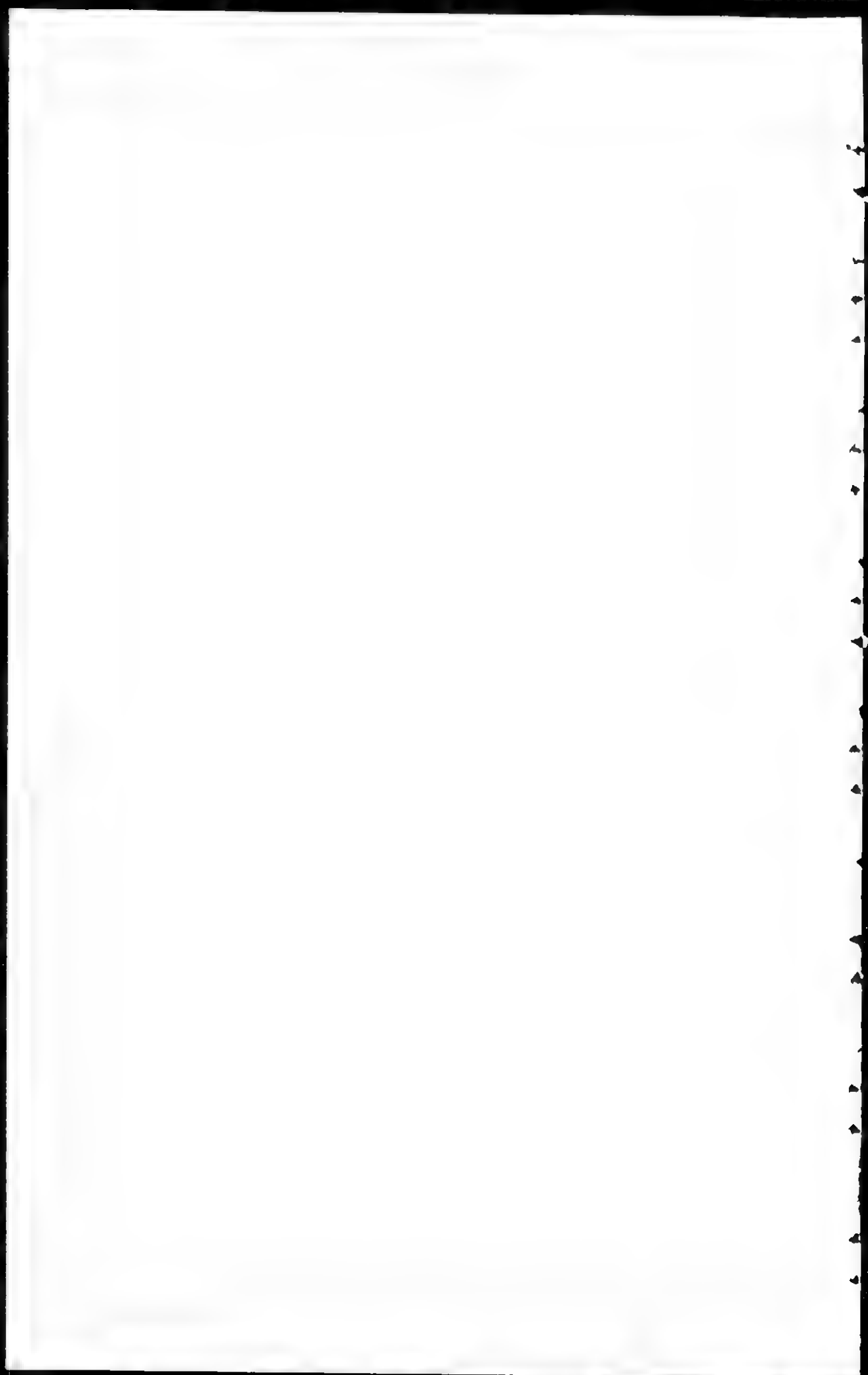
MACLEAY, LYNCH, BERNHARD &
GREGG

1625 K Street, N.W.

Washington, D. C.

Ex. 3-3390

Attorneys for Defendant
Robert Engle



Findings of Fact and Conclusions of Law

This matter came on for trial on plaintiff's complaint for damages due to personal injuries and losses suffered as a result of a collision which occurred on August 12, 1962 when a boat operated by the defendant Engle collided with a boat operated by the defendant Long on the Potomac River. Plaintiff brought suit against both defendants. The defendants filed cross claims against each other.

Upon consideration of the pleadings, the evidence adduced at the trial, and the argument of counsel, the court makes the following

FINDING OF FACT

1. The collision in question occurred on the Potomac River, opposite Ft. Belvoir, Virginia, on August 12, 1962. Plaintiff was a passenger in a speed boat being operated by defendant Long. The defendant Engle was also operating a speed boat and immediately prior to the accident was approximately 100 feet to the left side and 50 feet in front of defendant Long's boat.
2. Immediately prior to the collision, defendant Engle's boat was being operated at a speed of approximately 30 to 35 miles per hour when he lost control of the boat, and it veered to the right and struck defendant Long's boat.
3. At the time of the collision there were approximately 15 boats operating within the radius of one-half mile of the two boats in question.
4. The boat of defendant Engle was originally powered with a 130 HP engine but prior to the day of the collision Engle installed a 230 HP engine in his boat. His experience with his boat with the new engine was limited to approximately two operating hours prior to the collision.
5. At the time of the collision and just prior thereto, the visibility was good and there was a prevailing wind of approximately 7 miles per hour, leaving a slight chop on the

water. The water contained wakes from other boats which in the exercise of ordinary care and caution should have been visible to defendant Engle. He proceeded through the area without taking corrective action, such as reducing his speed, which a reasonably prudent man would have taken under the same circumstances. His boat hit a wake and went out of control and veered to the right, striking defendant Long's boat.

6. The defendant Long in the exercise of due care was unable to avoid the collision.

7. The plaintiff Stull, as a direct result of the collision, was thrown from defendant Long's boat into the water and, in being so thrown, suffered an injury to her left hand and left leg. The injury to the hand consisted of a laceration which severed the digital nerve. The injury to the leg consisted of a bruise to the thigh.

8. At the time of the accident plaintiff was and now is employed as a secretary for the United States Air Force.

9. Plaintiff has lost 25% of the function of her left hand as a result of the injury received in the collision. The loss of function is permanent. Plaintiff's ability to type and do other work has diminished since the accident.

10. The injuries received by plaintiff were painful, and at times she still has pain and suffering as a result of said injuries. The plaintiff is now 23 years of age and has a life expectancy of 55 years.

11. The medical expenses of plaintiff and her loss of wages amount to \$1,564.70.

12. The defendants Long and Engle have filed cross claims against each other.

CONCLUSIONS OF LAW

1. The defendant Robert Engle negligently caused the collision in question, and the plaintiff's injuries were the proximate result of the said collision.

2. The defendant Long did not cause or contribute to the causation of the collision in question.

3. The plaintiff has sustained a serious, painful and permanent injury to her left hand.

BURNITA SHELTON MATTHEWS
Judge

November 23, 1965

Order

Findings of Fact and Conclusions of Law having been entered herein, it is by the Court, this 23rd day of November, 1965,

ORDERED :

1. That the plaintiff is awarded damages in the amount of \$21,000.00, against defendant Robert Engle.

2. That the Court finds in favor of defendant Thomas Long on the Complaint and the Cross Claim of Defendant Engle.

/s/ BERNITA SHELTON MATTHEWS
Judge

Notice of Appeal

Notice is hereby given that Robert I. Engle, defendant herein, hereby appeals to the United States Court of Appeals for the District of Columbia from the final judgment entered herein on November 23, 1965.

JAMES C. GREGG
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Ex. 3-3390
Attorney for Appellant,
Robert I. Engle

Transcript of Proceedings—November 12, 1965

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PROCEEDINGS

The Clerk: Stull v. Engle, et al. Are counsel ready?

Mr. Cramer: Yes.

The Clerk: Please identify yourselves to the Court and to the reporter.

Mr. Cramer: Good morning, Michael Cramer, Your Honor, attorney for the plaintiff, Miss Stull.

Mr. Gregg: James Gregg, counsel for the defendant Engle.

Mr. Carr: Lawrence Carr, counsel for the defendant Long.

The Court: You may proceed, Mr. Cramer.

Mr. Cramer: Yes, Your Honor. Your Honor, I have prepared a plaintiff's trial memorandum which I believe will be helpful to the Court and is an essential part of our case as far as certain elements of the testimony which I will explain. I would like to tender that to you. Defendants' counsel have copies of that, Your Honor.

I would like to make a brief opening statement, Your Honor, which I believe would be of some help.

The Court: Yes.

Mr. Gregg: Your Honor, before we begin, may we
4 have a rule on the witnesses?

The Court: You may.

The Clerk: Will all witnesses retire to the witness room until called.

(The witnesses left the courtroom.)

Mr. Cramer: May it please the Court, this case involves a boating accident on the Potomac River near or opposite Fort Belvoir on August 12, 1962, just three years and three months to the day from today's date.

Plaintiff, we believe the evidence will show, was a passenger in a speedboat being operated by defendant Mr. Thomas Long, and there was a collision between Mr. Long's

boat and a boat being operated by defendant Mr. Robert Engle.

For purposes of liability, we have taken the depositions of the two defendants. We plan to offer in evidence certain portions of these depositions; we do so in accordance with the case cited as Pursche v. Atlas Scraper and Engineering Company, decided by United States Court of Appeals and it is in volume 300 Fed. 2d.

The Court: What is the volume number?

Mr. Cramer: 300 Fed. 2d, Your Honor, page 467, the specific portion that I refer to is on page 488, which states that even though the defendants or the opposing
5 party, whoever they may be, are present in the courtroom, their depositions may be offered as part of the plaintiff's case. The United States Court of Appeals in that case also states, this is the 9th Circuit, Your Honor, also states the manner in which it should be done, that is, for plaintiff's counsel to point out the portions of the record to the Court, the exact portions that he desires the Court to read.

In my trial memorandum, Your Honor, page 3 thereof, I have set out in items No. 1 through 9, the exact pages of the depositions and the exact lines and the essence of the testimony, we plan to offer that into evidence, and then we will have an expert witness who will be given the so-called hypothetical question and that hypothetical question, designed for him to give testimony as to the causation of this accident, is contained on the fourth page, Your Honor, as item Roman Numeral No. VI.

Through the expert witness and the testimony of Miss Stull, the plaintiff, we hope to establish the liability for this accident, she was a passenger.

The next element is the damage. The plaintiff has suffered a very serious injury, we intend to prove, a very painful injury. She has a permanent loss of 25% of the function of her left hand. She is a 23-year-old typist
6 employed by the government.

The injury, Your Honor, is a severed digital nerve in the thumb as a result of the accident. This is the deep nerve in the thumb, a basic, main nerve. There is no cosmetic or no serious cosmetic problem, Your Honor. The pretrial statement states there are moderate scars in the palm of the hand, there are moderate scars, but we do not contend that is a great problem. It is the pain, discomfort and loss of function that we are here for.

I might say that we intend to prove that the plaintiff is a secretary with the government. As a result of this accident, her typing speed has diminished and I believe she will testify to approximately twenty words per minute; that she is unable to obtain a next grade raise which is a Grade 6, that this immediately has resulted in a loss of \$783 a year. We believe that it will result in a loss of at least \$1,000 a year, if she were in the grade and receiving step grade increases within that grade.

We intend to offer testimony from her two supervisors, a woman who is her superior in the office, as to her speed and as to her pain and suffering on the job; and testimony from her male employer, who is the head of the office, as to the pain and suffering, the incapacity on the
7 job.

We also intend to offer Dr. Koth, who is a specialist in surgery in the State of Virginia and who has been treating her as a doctor.

We intend to show her special damages were \$1,628.24.

As I say, the loss is permanent, painful and resulted in the loss of income.

Thank you, Your Honor.

The Court: Mr. Gregg.

Mr. Gregg: Your Honor, there is a question in this case as to the cause of the collision between the two boats operated by the respective defendants.

The evidence will show from the Defendant Engle's point of view that he was traveling down river operating his boat at a reasonable rate of speed, that the Long boat, the

boat operated by the Defendant Long, was approximately 100 feet to my client's right and approximately 50 feet behind it; that for some unexplained and uncontrolled reason, the Defendant Engle's boat suddenly went out of control and made a sharp turn to the right.

The Court: Miss Stull was in the boat of Mr. Engle?

Mr. Gregg: No, the plaintiff here was a passenger
8 in the boat of Mr. Long, that would be the boat that was following and behind.

The Engle boat went out of control and made a sharp right turn and in the meantime the Long boat was approaching on the right and just before the accident Mr. Long swerved his boat to the right in an effort to avoid the accident and Mr. Engle had swerved his boat sharply to the left but the two boats came together.

As a result of the collision, the plaintiff was one of those passengers on the Long vehicle who was thrown into the water and suffered, among other injuries, a cut on the inside of her thumb, a laceration or a cut.

Now, the plaintiff has alleged and has accepted the burden of proving that this accident was caused by the negligence of the defendants and so far as my client is concerned, Your Honor, we deny that we were operating our vehicle in a careless or a negligent manner and we submit at the close of the evidence the proof will not support such a contention.

Thank you.

Mr. Carr: Your Honor, I am Mr. Carr, I represent the defendant Long. I believe that Mr. Gregg has fairly accurately set the scene of this accident. It happened
9 on the Potomac River less than a mile below Marshall Hall, I think the river is about a mile wide at that point.

We had two power boats here, 18 and 20 feet long, and the people were going some distance south of there to do some water skiing in a cove.

The Court: These boats were going in the same direction?

Mr. Carr: They were going in the same direction, Your Honor.

The Court: And the Long boat was ahead of the Engle boat?

Mr. Carr: The Engle boat was approximately fifty feet ahead and about one hundred-plus feet off to the left front of the Long boat, relative positions like that as they were going down the river on parallel courses.

It was a clear day, a boatman would say there was a slight chop in the water, apparently about a six-inch chop, little waves. There were other boats on the river; as Your Honor knows, this is a busy river and there were some wakes although nothing, apparently, unusual.

As they were proceeding along at, the testimony will show, what they considered to be cruising speed, probably about 30 miles an hour—and I understand in motor-
10 boats they use miles per hour rather than knots, so laymen like myself can understand what they are talking about—the Engle boat literally spun up, I think is the proper term, just spun off to its right for some unknown reason, almost became air-borne at that time. It spun off to such a degree that by the time it came over and came into contact with the Long boat which was on a parallel course, it was almost upside down; in fact, it was upside down, and the left side of the Engle boat came in contact with the left side of the Long boat showing by that time it had spun all the way around. It is a little hard to visualize, but that is what occurred. In fact, it was not only the left side of the Engle boat but it was the left bottom, below the water line, that came in contact with the Long boat.

Now, the testimony will show that Mr. Long was traveling at almost identically the same speed and, realizing this was occurring, attempted to swerve to his right. He didn't quite make it and the two boats came together.

The Engle boat sank almost immediately, that is the one that was already upside down; the Long boat stayed afloat

for awhile and almost made it into shore and other boats came to the area and picked up survivors and took them into the Fort Belvoir Hospital.

Your Honor, as Mr. Cramer has pointed out in his
 11 brief here, this is basically an admiralty case even though it is on the law side of the court and the substantive law on the case would be admiralty.

Now, Long is going to depend on two admiralty substantive law positions, namely, the rather firm one on extremis, which I will quote to you cases to support my position later, actions requiring in extremis, and also on the major-minor rule.

The Court: Also on what?

Mr. Carr: Major-minor rule, it is peculiar in the law of admiralty which in effect states when there are two vessels and one vessel is much more negligent than the other, assuming there is negligence to start off with, and the other might have a small degree of negligence, that the Courts are very lenient in looking upon the negligence of the minor and will disregard it. In fact, there is a rebuttable presumption that this would occur. I will give you cases as far as that position later, which I have.

The Court: That is the theory of comparative negligence.

Mr. Carr: It is, in effect, the theory of comparative negligence only in this sense, seeing how we have a moiety
 12 rule on damages, which is an equal rule on damages, under this particular doctrine rather than apportion the damages, assuming there is any finding in favor of the plaintiff, they drop off the minor party, the less liable one. There has to be a substantial degree of difference, Your Honor, in fact this case will show this.

However, the position that Long takes is twofold; in the first place, we don't believe there is any negligence. We believe this is an unavoidable accident, powerboats being what they are, dangerous vehicles, this is unavoidable. But in the alternative, we claim that if there was negligence, it was the negligence of the operator of the Engle boat.

Thank you.

Mr. Cramer: May it please the Court, may I point out two things?

The Court: Yes.

Mr. Cramer: We will request the Court to take judicial notice of two statutes referred to in paragraph III beginning on page 1 of the plaintiff's trial memorandum. This is the Federal Motorboat Act, Section 46, United States Code Annotated, Section 526(1), it looks like the small letter "l," which is also 54 Stat. 166, passed in 1944, which provides, this federal statute provides:

No person shall operate any motorboat or any
 13 vessel in a reckless or negligent manner so as to
 endanger the life, limb or property of any person.

This has been applied in the case of *United States v. Meckling*, 141 Fed. Supp. 698, District Court of Maryland, 1959, in which the Court defined negligence as failure to exercise reasonable care as a prudent man would under ordinary circumstances.

We also rely, Your Honor, on the Inland Rules of the Road, promulgated by the United States Coast Guard, Article 29, which is also a part of the United States Code annotated, Title 33, Section 213.

Now, in my trial memorandum, Your Honor, I cite that plaintiff relies on Article 29, Inland Rules of the Road. I neglected to assert that that is also in the United States Code.

The Court: Now, I didn't get the citation, 33 U.S. Code?

Mr. Cramer: Yes, ma'am, 221, and this was the basis, this statute was being used as a basis of a similar boating accident between two speedboats and it provides:

Nothing in these rules shall exonerate any vessel, or the owner of any vessel, master or crew, from the consequences of any negligence to carry lights or signals—and what we
 are concerned with—the consequences of any neglect
 14 to keep a proper lookout or the neglect of any
 precaution required under similar circumstances.

The Court: What do you claim that Mr. Long's negligence was?

Mr. Cramer: Mr. Long failed to see a water wake, that is, if I may express it, a wave left by, apparently, another boat. He stated to the Coast Guard, and this is in evidence in the Coast Guard's report made after the accident—

Mr. Gregg: I don't think any reference to the Coast Guard, Your Honor, is proper.

The Court: Was it a report made by Mr. Long?

Mr. Gregg: No.

Mr. Cramer: It was made by Mr. Engle, Your Honor. We claim that Mr. Engle was negligent and we claim his negligence—

The Court: I was making inquiry about Mr. Long.

Mr. Cramer: I am very sorry, Your Honor.

The Court: I was trying to find out what you claimed Mr. Long's negligence was and then you said he failed to see a water wake.

Mr. Cramer: No, that applied to Mr. Engle and I am very sorry, Your Honor.

The Court: All right.

15 Mr. Cramer: As to Mr. Long, we can say that his boat was in a position of danger; placing his boat in a position of danger, that is the only element of negligence that we do contend against Mr. Long, excepting of course if the trial develops something else, there might be another factor. However, at this point the only element of negligence claimed against Mr. Long is placing his boat in a position of danger. The two boats were, so to speak, together, going down the river together.

As to Mr. Engle, may I say that we feel the negligence, Your Honor, will be failure to see a wake which he should have seen and there is in fact a case between two speedboats which says that the driver of a speedboat—

The Court: What case is that?

Mr. Cramer: I have quite a bit of law on the subject and I had it—I would say this, Your Honor, during the course of the trial I would like to get the particular case.

The Court: That is all right.

Mr. Cramer: One more thing, please, we do not, as Mr. Gregg has suggested to the Court, accept the burden of proving negligence. We have set forth a case in the complaint of *res ipsa loquitur*, that is, the instrumentality causing the complaint, to wit, the speedboats, were under the control of both defendants, and that this was an occurrence which would not ordinarily have occurred were it not for negligence.

Under the decided law in the District of Columbia, we do not use—I am sorry—the benefit of the *res ipsa loquitur* doctrine unless we have so sufficiently spelled out negligence that it becomes inapplicable, and I respectfully submit it is for the Court to determine whether we have so sufficiently spelled out negligence during the course of the trial as to be deprived of the *res ipsa loquitur* doctrine. But in either event, Your Honor, we claim that the plaintiff is entitled to the benefit of the *res ipsa loquitur* doctrine.

Thank you, Your Honor.

The Court: Well, you still would have the burden of proof, but even if the circumstances were such that an inference of negligence arises under this doctrine that you referred to, on the whole case you still would have the burden of proving it.

Mr. Cramer: Yes, ma'am.

The Court: All right.

Mr. Cramer: We are ready to proceed, Your Honor.

Mr. Gregg: I would like to say this, at this point.
17 Plaintiff filed a pretrial statement, attended a pretrial, and we have a pretrial order which I assumed governed the issues upon which this case would be tried. To my knowledge, there is nothing in either the plaintiff's pretrial statement or the pretrial order that mentions the doctrine *res ipsa loquitur*.

All of the plaintiff's allegations are specific allegations of negligence.

The Court: Is there anything in your claims that you are relying upon *res ipsa*?

Mr. Cramer: Your Honor, I did not expect this to come up. Offhand, I did not see it in my pretrial statement or the pretrial order. However, the complaint spells out a case in *res ipsa loquitur*. I respectfully submit that is a matter of the evidence to be heard by this Court and to be decided on at the conclusion of the case.

The Court: Are you ready now to call your first witness?

Mr. Cramer: Yes, Your Honor, I am.

The Court: Very well. I think I might tell you all now that the Court is going to adjourn for the day at 3:15.

Mr. Cramer: Yes, Your Honor.

Thereupon—

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Emogene I. Stull

plaintiff, called as a witness in her own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cramer:

Q. Will you please state your name? A. Emogene I. Stull.

The Court: Miss Stull, we are going to have a lot of trouble understanding you if you don't do better than that.

The Witness: I am sorry.

The Court: Would you raise the loudspeaker up a little bit this way and you sit forward some. All these people have to hear you over here, too.

Mr. Cramer, I think if you would stand over here a little bit, she wouldn't drop her voice.

Mr. Cramer: Yes, Your Honor.

By Mr. Cramer:

Q. Please state your name. A. Emogene Irene Stull.

Q. What is your address? A. 5001 Seminary Road, Alexandria, Virginia.

Q. And what is your age? A. I am twenty-three.

19

Q. What is your marital status? A. I am single.

Q. What is your occupation? A. I am employed by the Department of the Air Force at the Pentagon as a clerk-stenographer.

Mr. Cramer: Your Honor, I hope this is better sound wise.

The Court: Well, her voice is very soft. It doesn't carry very well against this air conditioner overhead, it has a swelling noise.

Mr. Cramer: Yes.

By Mr. Cramer:

Q. You say you are a clerk-stenographer? A. Yes, sir.

Q. What is your training? A. I have had four years of high school in a commercial course and I have also, while employed by the Department of the Navy, I completed a shorthand course with them.

Q. You say four years training in a commercial course, was that a secretarial course? A. Yes, sir, secretarial training.

20 Q. Have you worked at any occupation other than a secretary? A. No, sir, I have not.

Q. On August 12, 1962, were you involved in a boating accident? A. Yes, sir.

Q. The accident occurred on the Potomac River? A. Yes, sir.

Q. At the time of the accident, were you a passenger in Mr. Long's boat? A. Yes, sir.

Q. Was the other boat involved, a boat belonging to Mr. Engle? A. Yes, sir.

Q. Now, please describe in your own words to the Court, take your time and please keep your voice up, Miss Stull, your activities on that day of August 12, 1962, prior to the accident. A. In the morning on August 12, 1962, a friend and myself drove over to Mr. Long's boat yard. There we met Mr. Long, who was still working on Mrs. Engle's boat.

We stayed at the boat yard for about an hour and a half, and then we went on up the Potomac in the boat. I was a

passenger in Mr. Long's boat, myself and six other passengers. There were three passengers in Mr. Engle's boat.

21 We headed south on the Potomac toward Marshall Hall. When we reached Marshall Hall, we stopped for a few moments on the water, both boats.

We decided we would go on up the river, and Mr. Long's boat started out. Mr. Engle's boat did not start when we did, he waited in the water a few moments.

I was sitting about midway of the boat, on top of the hatch cover, and I was watching Mr. Engle's boat behind us. I could see his boat coming up and it was skipping along the water, actually leaving the water at certain points.

The Court: You say skipping along the water, you mean jumping out of the water?

The Witness: Yes, ma'am. Mr. Engle come up alongside of us on the right.

By Mr. Cramer:

Q. You say he was on the right. Which side of Mr. Long's boat was he, looking front? A. Oh, he was on our left side, I was facing—I was sitting facing Mr. Engle, so he was on my right.

Q. You were facing back, were you? A. Yes, but he was on the left side of the boat. He come up in the water alongside of us and he came to a point where he passed us.

22 The Court: He came up?

The Witness: He came up on our left side and passed us.

The Court: And what?

The Witness: And passed our boat in the water, Your Honor. After he passed us, his boat appeared to make a sudden turn to the right.

The Court: Just one moment.

Would you read what she said?

(The answer was read by the reporter.)

The Court: Very well.

The Witness: Mr. Long tried to turn his boat to the right in an effort to avoid Mr. Engle, but it didn't help and Mr. Engle hit our boat. I was thrown out into the water.

Mr. Cramer: One moment, please. Your Honor, would it be of any help for Miss Stull to come to the board and make a simple diagram?

The Court: Yes, I think that would be very helpful. I don't think she ought to try to testify, though, from the blackboard because I think the reporter will have too much difficulty getting it. You might tell her what you want her to draw.

Mr. Cramer: Yes, ma'am.

23 Would you please draw a boat, depict an object as a boat, Defendant Long's boat.

(The witness made a drawing.)

Mr. Cramer: Miss Stull, could you draw that a little darker?

The Court: You can hardly see it from here.

(The witness made the drawing darker.)

Mr. Cramer: Now, would you please draw a picture of how the accident happened, showing Mr. Engle's boat. Show us at what point, where Mr. Engle was in relation to Mr. Long when Mr. Engle's boat turned into Mr. Long's boat or turned to the right.

The Witness: Mr. Engle come up along the left-hand side of the boat, he was coming up this way. He come up and he passed us.

Mr. Cramer: All right. Put where he was before he turned in.

The Witness: He was about here.

The Court: Whose boat is that?

The Witness: Mr. Engle's. He came up and he passed us. When he came up here on our left-hand side—

The Reporter: I am sorry.

24 The Court: The reporter can't get what you are saying.

Mr. Cramer: Just a second. I am sorry, just continue.

The Witness: This is Mr. Engle's boat, he came up and he passed us. When he came up here on our left-hand side, his boat made a sudden turn to the right and we continued on in this fashion and he hit our boat. At that point, I was thrown into the water.

Mr. Cramer: Would you return to the stand, please.

(The witness returned to the stand.)

By Mr. Cramer:

Q. You state there was a collision between the two boats?

A. Yes, sir.

Q. What happened to you? A. I was thrown out of the boat and into the water.

Q. Was anyone else thrown into the water? A. Yes, four of the passengers on Mr. Long's boat were thrown into the water and all of the occupants of Mr. Engle's boat were thrown into the water.

The Court: All of the passengers in Mr. Engle's boat?

The Witness: Yes, the three passengers in Mr.
25 Engle's boat.

By Mr. Cramer:

Q. Was there any sound during the collision? What was it like? A. It sounded like a gun blast or a cannon. When he hit, it was a loud noise.

The Reporter: I think I had better read the answer (reading to the witness).

The Witness: It was a very loud, I don't know how to describe it when he hit us.

By Mr. Cramer:

Q. You say you were thrown into the water? A. Yes, sir.

Q. Were you on top of the water immediately after the accident or were you underneath? A. No, sir. When I

realized what had happened, I was going down in the water and I was afraid that I wouldn't come back up. And just suddenly I started coming back up to the top of the water and as I neared the top, I could feel another body near me in the water. I was so afraid that the person would be dead, but when I reached the top of the water, it was a girl who had been a passenger on our boat.

When I come up in the water, I had the flag pole,
26 which we later found out was the flag pole off of Mr. Engle's boat, under my right arm.

I stayed in the water, oh, for about ten minutes, until everyone hollered, seeing if everyone was there and all right.

They started throwing life preservers into the water and the girl who was with me started to help me put a life jacket on and when I brought my left hand up out of the water, the blood run down my elbow and I realized then that I was cut; I didn't know beforehand, I was numb, sort of.

Q. Did you look at your left hand? A. Yes, I could see, between my thumb and index finger, I could see clear to the bone on my left hand.

Q. You say you could see to the bone of your left hand? A. Yes, sir.

Q. How long were you in the water? A. I was in the water about forty-five minutes, I guess, before anyone was able to get me out. There had been several boats in the area but they were all so large and they had tried to get me out of the water three or four different times, but the boats were so large and I couldn't help them at all with my hand, and finally a boat came along that was large but it was a flat boat and the man lifted me out of the water.

27 Q. Now, before the accident, what were the weather conditions on that day in that area of the Potomac River? A. It was a beautiful sunny day out and there were several boats on the water, in fact that large sailing

ship that was used to make Mutiny on the Bounty was in the area.

Q. Were the folks looking at that boat? A. Yes, sir.

Q. That Mutiny on the Bounty ship? A. Yes, sir. In fact, one of the passengers in our boat took pictures of the Bounty that day.

Q. Could you give us an estimate of how many boats were in the area of your boat prior to the time of the collision? A. I would say perhaps ten or fifteen, at least, right in the area, perhaps one or two city blocks within the area.

Q. Perhaps one or two city blocks from the two boats, Mr. Engle's and Mr. Long's boats? A. Yes, sir.

Q. And the weather was clear, visibility was good, I take it? A. Yes, sir.

Q. Now, after you were taken into a boat or placed in this boat you referred to, where were you taken? A. I was taken from the scene of the accident to the
28 Fort Belvoir Officers Marina. I was taken from there to the Fort Belvoir Hospital in an ambulance.

Q. All right. Now, do you know what caused you to cut your hand? A. The propeller on Mr. Engle's boat.

Q. Now, you say the flagpole was under your arm after the accident? A. Yes, sir.

Q. Was the flagpole broken off? A. Yes, sir.

Q. You say you were taken in an ambulance to Fort Belvoir Hospital? A. Yes, sir.

Q. What was done for you there? A. I was seated in the Emergency Room and my left hand was placed in a bowl of water because of the grease and everything that was in my left hand. I sat there for perhaps thirty minutes, then I was taken into the operating room. I was given Novocain into the left hand and they worked for perhaps a half an hour to an hour trying to get all the grease out of the hand and they started mending the nerve in the hand.

Q. You say they worked for half an hour to an
29 hour trying to get the grease out of your hand. Who
is "they"? A. There were two doctors and one
nurse. One doctor held my thumb in a position so he could
work on the tendon that was severed and also the nerve.

Q. What did they do as regards the thumb and the nerve?
A. They repaired the tendon and the nerve.

Q. Did they sew the tendon? A. Yes, sir.

Q. And sew the nerve? A. Yes, sir.

Q. And you say one doctor was holding your thumb
back? A. And the other one was working on the area that
needed repair.

Q. About how long did this operation take? A. They
worked for about an hour and it was really bothering me,
it was terrible, and they had to give me another shot of
Novocain before they even started to repair the outside.

Q. Where did you go after leaving Fort Belvoir? A. I
was taken from the hospital back to the Fort Belvoir
Marina and I was taken from there to my apartment in
Arlington.

Q. Now, Miss Stull, there is a medical course of
30 events that I have already asked you about in my
office. I would like you to please, slowly and keep-
ing your voice up as I think you are now, tell the Judge
what was the medical course of events after the operation
at Fort Belvoir? A. The next morning I called my physi-
cian and reported to his office for a complete physical. I
was examined and given a prescription for pills for pain
and at that time my physician recommended Dr. Koth to
me.

Q. Who was your physician? A. Dr. Mandamis and
Dr. Ostergard, both doctors.

Q. And after Dr. Mandamis looked at you preliminarily,
you were referred to Dr. Koth? A. Yes, sir.

Q. Who is in Virginia? A. Yes, sir.

Q. And is his specialty surgery? A. Yes, sir.

Q. Please tell us the course of events with Dr. Koth and there on. A. On Friday, August 17, I had the stitches removed from my left hand.

The Court: You had what?

The Witness: The stitches removed from my left
31 hand. Dr. Koth gave me a tetanus shot at that time. He then asked me to make an appointment with Dr. Buchanan, who was a physical therapist. He told me that he would like to see me the following week, however, before I went over to see Dr. Buchanan. So I returned to Dr. Koth, and from Dr. Koth's office I went over to Dr. Buchanan's office. I visited Dr. Buchanan for the next week and a half, every day.

By Mr. Cramer:

Q. What did Dr. Buchanan attempt to do for you? A. I had lost the movement in my left hand and Dr. Buchanan worked with various means of therapy to try to restore the movement. I was then sent from Dr. Buchanan's office back to Dr. Koth's office.

Q. When you say loss of movement in your left hand, do you mean your entire left hand? A. No, the area between the thumb and the forefinger.

Q. The thumb and? A. The index finger.

Q. Index finger, all right, continue. A. Dr. Koth told me that he would like to continue seeing me because I still had pain in my left hand. I returned to Dr. Koth's office for the next three or four months on regular visits for
32 him to check my hand. He then sent me over to Arlington Hospital where I had X-rays taken of my left hand. I returned to Dr. Koth's office, and a month later he performed a biopsy in his office. He removed a lot of the scar tissue as well as foreign—

Q. Yes, ma'am, the scar tissue? A. He removed a lot of scar tissue as well as foreign bodies that he couldn't, the laboratory was unable to describe or give a report on what it was. After the biopsy, I was sent back to Dr. Buchanan again for physical therapy.

Q. She is the physical therapist? A. Yes. I continued seeing Dr. Buchanan for about a week and a half. I was sent back to Dr. Koth. I continued seeing Dr. Koth for the next six months. I then had X-rays taken in Dr. Bullock's office.

I was sent back to Dr. Koth's office and in August of 1963, Dr. Koth performed an operation on my left hand in the Northern Virginia Doctors Hospital.

Q. Is that in Arlington, the Northern Virginia Doctors Hospital? A. Yes, sir.

Q. And you were hospitalized there for the operation?

A. Yes, sir.

33 Q. Please continue. A. Dr. Koth operated on my left hand and I remained in the hospital for four days. I returned to Dr. Koth's office, my hand was put in a splint and I had my arm in a sling.

I was then sent back to Dr. Buchanan because again I had lost the movement in my left hand. I continued seeing Dr. Buchanan for another two weeks and I was sent back to Dr. Koth. Dr. Koth at that time asked that I make an appointment with Dr. Lewis, who was a neurologist. She had prescribed—

Q. Dr. Lewis is a woman doctor, I take it? A. Yes, sir.

Q. And she is a neurologist? A. Yes, sir.

Q. Tell us about the course of treatment with the neurologist. A. Dr. Lewis prescribed a prescription for me on vitamins that she said would help, she believed would strengthen the tendon in my left hand that appeared to be giving me so much trouble. I took the prescription for two months, but any result that did come about wasn't—the result from the vitamins, I did have a lot more energy but it didn't help my hand. I returned to Dr. Koth's office and I have been seeing Dr. Koth since that time.

34 Q. All right. When did you last see Dr. Koth, when did you last consult with Dr. Koth? A. I consulted with Dr. Koth yesterday. I talked to him on the telephone and asked him or asked for his advice, I

now have a lump in the left hand between the thumb and the index finger.

Q. You have described for me a period of three years and three months. Has this left hand been painful during that period of time? A. Yes, sir.

Q. During the last week, have you received any pain from it? A. Yes, sir, considerable.

The Court: You say this lump is in your left hand and it is between the thumb and what?

The Witness: And the index finger, down in here.

Mr. Cramer: Would you show the Judge, please?

The Witness: Right here is where the lump is.

By Mr. Cramer:

Q. Now, does the hand interfere with you—incidentally, did Dr. Koth also prescribe things for you to do or medical treatment to receive in the Pentagon where you work?

A. Yes, sir, after the accident and after the stitches—

35 The Reporter: After what, please?

The Witness: After the stitches had been removed—

The Court: Miss Stull, if you put your mouth right on the loudspeaker, it will distort your voice. Just back away a bit.

By Mr. Cramer:

Q. What was done for you by the medical services of the Pentagon? A. I reported every afternoon to the civilian dispensary at the Pentagon and I was asked to sit for forty-five minutes with my hand in a bowl of water and physophex, it's a surgical soap.

Q. Miss Stull, does your hand now interfere in any way with any of your activities?

Mr. Gregg: I object, Your Honor, that is a leading question.

The Court: The objection is sustained.

By Mr. Cramer:

Q. At work, do you have any problem as a result of your hand?

Mr. Gregg: I object again, Your Honor.

The Court: The objection is sustained.

By Mr. Cramer:

36 Q. Will you please tell us how, if at all, your hand affects you at work? A. Yes, sir. I have considerable trouble at work. I have lost a lot of strength in the left hand, I am unable to lift anything heavy and I do have a problem typing in that I try to keep the thumb—

The Court: You try to keep what?

The Witness: I keep my thumb up in the air while typing so that I don't bump it.

By Mr. Cramer:

Q. What happens if you bump your thumb? A. I have considerable pain.

Q. Now, will you show to the Judge, raising your hand, what you mean when you say you type and keep your thumb up in the air? A. I try to keep the left thumb up in the air so I don't bump it in any way, touch the typewriter or anything.

The Court: Don't you have to use your thumb for some of the letters on the typewriter?

The Witness: No, ma'am, the thumb is used for the space bar and I use the right thumb at all times for this.

By Mr. Cramer:

37 Q. You have held your left thumb up in the air, hold it up as far as it will go. A. That is as far as it will go (indicating).

Q. Hold it up so the Judge can see. Now, hold your right thumb up as far as it will go. A. (Holding thumb up.)

Q. Now, prior to the accident, were you able to hold your left thumb higher than this? A. Yes, sir.

Q. You mentioned there is a problem caused by the thumb in typing. Specifically, tell us how it usually operates in interference? A. From holding the thumb in that position to keep it out of the way of any bumps or jars, it puts a strain on my left hand that causes pain that goes up into the index finger and down into my wrist.

Q. Please show what you mean, you say when you hold your thumb up for awhile it causes pain and please show Her Honor where in your hand and you say your wrist it comes. A. I have a pain that goes down into the wrist and up into the index finger from holding the thumb in that position. This causes a problem for me in that the right hand wants to continue on like it always has, with the regular rhythm, that is necessary in typing, but I
38 have lost the rhythm in my left hand and this causes a definite problem for me in typing.

Q. Now, you say that it becomes stiff. Is there any period of time after the typing that it becomes stiff? A. Yes, sir. After I have been typing for perhaps an hour, I start having a definite problem with the hand and I usually try to stop and do something else, filing or whatever else I have to do, unless it is something that has got to be done and then the supervisor in the office will usually—usually she is able to complete it for me.

The Court: Are you right-handed or left-handed?

The Witness: I am right-handed.

By Mr. Cramer:

Q. Is there anything other than typing at work that causes interference as a result of the hand? A. Yes sir. I work in a very secure area at the Pentagon.

Q. What do you mean by secure? A. Everything is locked up, nothing is permitted, any wastepaper cans or anywhere in the desk or on top of the desk everything must be locked up at night.

Q. You work for the Department of the Air Force? A. Yes, sir.

Q. You work in the communications division of the
39 Air Force? A. Yes, sir.

Q. Now, you were saying you work in a secure area? A. Yes.

Q. Please proceed. A. In our office, we keep huge bags that we refer to as burn bags and all the paper, carbon paper and everything that we use during the day, is to be torn up and put in those bags. I have a lot of problem when I try to tear up anything because of the pressure that is placed on the left hand, and we destroy documents, oh, perhaps we will have twenty a day that we have to destroy or must destroy and I have a problem with that also.

Q. All right. Now, are there any activities other than work in which the hand causes interference?

Mr. Gregg: Objection, Your Honor, that is a leading question.

Mr. Cramer: I don't see, Your Honor, how it is leading.

The Court: Now, you put in it that it causes interference. You don't have to say anything about interference, she can explain it to you.

Mr. Cramer: Yes, ma'am.

By Mr. Cramer:

40 Q. In your ordinary daily living, Miss Stull, tell us how the hand affects you. A. The common, ordinary usage of my left hand bothers me all the time in everything I do, because I am constantly using my hand, naturally that is all I have got to use. And at home, I have trouble ironing, because I have got to hold whatever I am ironing with the left hand. I have trouble, well, the trouble ironing. I have trouble washing out anything by hand, I have a problem when I wash my hair, it will take me sometimes an hour and a half to set my hair because I will put in a few rollers and stop and go do something else and then go back to setting my hair. I can't, it is impossible for me to hold an orange or an apple to peel it, I can't do it. I have a problem in the morning and at

night in getting dressed, I have a problem fastening my clothes.

Q. All right. You told me, did you not, an incident referring to being on the bus? A. Yes, sir.

Q. Would you please relate that to the Court. A. In the apartment building that I live in, I live out in Alexandria and I take a bus in every morning to the Pentagon. I am going to night school right now and my one class, I have
41 six books to carry. Most of the time when I get on the bus, the seats are already filled and I have to stand. I can't hold onto the rail with my left hand, so I have to hold on with the right and that means holding the books in the left hand or placing them on the floor, and usually there is not room for them on the floor because the bus is filled in double rows from the back to the front, so I must hold the books. And this, many times, by the time I get to work, I have considerable pain already before I even begin to type.

Q. Now, since the accident, has there been any difference in your typing speed? A. Yes, sir, my speed has decreased.

Q. Keep your mouth about this far away and speak up. Your typing speed, please? A. My typing speed has decreased about 20 words per minute.

Q. You say your typing speed has decreased about 20 words per minute? A. Yes, sir.

Q. Now, do weather conditions affect you in any way? A. Yes, sir. In the winter time, the coldness affects my hand; also, when it rains, I have a constant ache in the
42 joint. And the doctor has advised me that, in my office, because of the air conditioning, he thought that the air conditioning added to the pain and he suggested wearing a glove, but I can't wear a glove on my left hand and type.

Q. Are there any other times when you feel pain? A. Yes, sir. I have gotten awake at different times at night,

my hand would be bothering me, and I could be sitting reading in my apartment and my hand will bother me.

Q. You mean even though it is not being used, you will have the pain? A. Yes, sir.

Q. Would you describe the pain in terms of your past experience with perhaps other type pains? A. Well, it will ache almost like a constant toothache only there is nothing I can do to help it. With a tooth, I could go to the dentist, but there is nothing I can do for the pain.

Q. Are you bothered at any times during the night when you are sleeping? A. Yes, sir.

Q. Tell us about that. A. Yes, sir. Many times, well, at night when I go to bed I will have rollers in my hair and to keep my head off the pillow, I will lay on my arm
43 and I will try to keep the right hand under my head but once I fall asleep, I usually wake up and the left hand is bothering me and it is because I have been sleeping on the left hand.

Q. Now, Miss Stull, what is your present salary? A. It is \$5,495.

The Court: I didn't get that. How much?

Mr. Cramer: Speak up.

The Witness: My present salary is \$5,495.

By Mr. Cramer:

Q. What is your grade? A. I am a GS-5, step four.

Q. Have you been a GS-5 since the accident? A. Yes, sir.

Q. Now, the next step grade is Grade GS-6, is it not?
A. Yes, sir.

Q. How much does a GS-6 earn? A. \$6,278.

Q. Has the injury to your hand prevented you from obtaining a pay grade increase to a Grade 6?

Mr. Carr: I object.

Mr. Gregg: I object to that, Your Honor.

The Court: The objection is sustained to the form of the question.

44 By Mr. Cramer:

Q. Do you know whether or not the injury to your hand has affected your work so far as pay is concerned or rating is concerned?

Mr. Gregg: I object, Your Honor.

Mr. Cramer: I would like to know why it is objectionable, Your Honor, because I would like to know how I can ask it.

Mr. Carr: You ask the proper people, Your Honor, I don't think she can properly testify whether or not her rating has been affected.

The Witness: Yes, sir, it has.

The Court: Just a minute. I don't know that she would know.

Mr. Cramer: Your Honor, I propose, if we can perhaps approach the bench and, ask the witness to step down, out of her hearing, I propose to tell what she will say which is a specific instance, well—

The Court: Does it include somebody who isn't present here now or what that person said to her?

Mr. Cramer: No, Your Honor, it does not. And furthermore, Your Honor, we will also have people coming to testify, her superiors, as to the inability of Grade 6—

45 The Court: Well, it seems to me if you are going to do that, that you might just eliminate her testimony in that regard. However, I have no objection to your coming to the bench and telling me what it is.

(At the bench:)

Mr. Cramer: Your Honor, the witness would testify, were she allowed to, that she has been eligible for a Grade 6 for a year and half now, but that a Grade 6 requires usually more typing and almost always a concentrated typing, a sort of rush typing which this Court might have, needing something immediately, and because of the hand she will not take a Grade 6, she feels she is having difficulty handling a Grade 5 as is, and that would be her testimony about it. I submit, Your Honor, this is a non-jury trial,

that this is not prejudicial but that it is for the Court to weigh.

The Court: It doesn't seem to me that to be in Grade 6 that they would require this kind of typing that you mentioned.

Mr. Gregg: That is the first objection, Your Honor. He says that she would be eligible, we don't know that she would be eligible. Whether she is eligible for a Grade increase or not depends on standards, or testimony of something from some other source that we have no means
46 of cross-examinig at least at this date.

The Court: I think this point is well taken.

Mr. Cramer: Yes, ma'am, I will delete that. Thank you, Your Honor.

(End of bench conference.)

The Court: At this time, we are going to take a recess of five minutes.

(A short recess was taken.)

By Mr. Cramer:

Q. Miss Stull, I show you this and ask you to identify it.
A. This is a Form 57, it is an application for Federal employment with the government.

Mr. Cramer: Would you please mark this as Plaintiff's Exhibit No. 1.

The Clerk: Plaintiff's Exhibit No. 1 for identification.

(Form 57 was marked Plaintiff's Exhibit No. 1 for identification.)

By Mr. Cramer:

Q. In transferring to a new department from your own, must one of these be filled out? A. Yes, an updated form is to be presented at the time you are called for an interview.

47 Q. You say an updated form? A. Yes, sir.

Q. Now, looking at Plaintiff's Exhibit 1, I ask you to refer to question No. 28. What is question No. 28? A. (Reading:) Have you any physical handicap, chronic disease or other disability?

Mr. Carr: Your Honor, I object to the use of this form, it apparently is a form prepared by the party herself, by the plaintiff, it is nothing but a self-serving declaration.

The Court: I haven't seen it. Let the attorneys for the other side see it, please.

Mr. Cramer: Yes, Your Honor. I believe it is prepared by the government, Your Honor.

Mr. Carr: I mean the answers, Your Honor, not the form.

I have no objection to the form, Your Honor. It is the answers that I am concerned with.

(The exhibit was handed to the Court.)

Mr. Cramer: It is question No. 28 that we referred to, Your Honor.

The Court: Since you are already in the government, why do you now fill out a form of this kind?

The Witness: If you will notice on the form, Your
48 Honor, you must keep all of your previous time with the government recorded on the form, your prior experience, before applying for that job, that specific job.

The Court: Are you saying this is a job you have applied for?

The Witness: No—

The Reporter: What was the answer?

Mr. Cramer: Your Honor, may I tell the Court the purpose of my question so perhaps I can better illustrate this.

The Court: Now, she isn't applying for a job.

Mr. Cramer: We intend to prove that people in the government, as a matter of course, will at times move from job to job and that when she does move to a new

job, she must file, as she said, an updated application, one of the questions on which would be do you have a disability? I would ask her, Your Honor, how would you answer the question?

The Court: Well, I will sustain the objection to your asking her that.

Mr. Cramer: Thank you, Your Honor.

By Mr. Cramer:

Q. Have you been absent from your work because of this accident? A. Yes, sir.

49 Q. Do you have records dealing with your time absence? A. Yes, sir, I do.

Q. Would you please tell us from these records—do you remember, you don't have an independent recollection, do you? A. No, sir, but from the doctor bills that I have received and the time that I have had to miss because of Doctors' visits, I have been able to compile what I think is a correct list of the time that I have missed from work.

Q. Now, using this memorandum, would you please tell us, tell the Judge, what time you have missed from work? A. From August 13, 1962—

Q. Which is the day after the accident? A. Yes, sir. Until 10 October 63, I missed 53 hours, the total pay loss equivalent, \$110.77.

The Court: You say that amounts to how many hours?

The Witness: Fifty-three hours, Your Honor.

The Court: And the amount is \$110 and what?

The Witness: Seventy-seven cents.

By Mr. Cramer:

Q. And incidentally, what was your hourly rate? A. The hourly rate at that time was \$2.09.

50 Q. Continue. A. From October 22, 1962, until July 1, 1963, I lost 71 hours and the pay hour rate was \$2.20. The total pay loss equivalent was \$156.20.

From July 1, 1963, through January 28, 1964, I lost a total of 130 hours. The hourly rate was \$2.28, the total pay loss equivalent is \$296.40.

The Court: \$296 or \$396?

The Witness: \$296. From January 30, 1964, through July 14, 1964, I lost 5 hours, at the pay rate of \$2.34, the total pay loss equivalent, \$11.70.

From July 15, 1964, through July 1, 1965, I lost a total of 55 hours, with a pay rate per hour of \$2.56, the total pay loss equivalent is \$140.80.

From 1 July 65 until present, I have lost 14 hours, the pay rate is \$2.64 an hour, the total pay loss equivalent is \$36.96.

By Mr. Cramer:

Q. Since the accident, how many times have you been to see doctors? A. Fifty-two visits I have made since the time of the accident to doctors.

Q. Plus there is also the hospital and so forth. A. Yes, sir. By the way, I have the total amount of hours
51 if you want them.

Q. Yes, please give us the total hours. A. The total amount of work lost away from work is 328 hours, and the total pay loss is \$752.83.

Q. \$752.83, you say? A. Yes, sir.

Q. Now, during the three years and three months since the accident, you have been away from work for other reasons, have you not? A. Yes, sir.

Q. Such as vacations? A. Well, I have taken, during the last three years, perhaps a month and a half of leave to be home with my parents while they were ill.

Q. Now, also, have you taken any sick leave during this period for reasons other than the accident? A. Yes, sir.

Q. Now, you say you have been to see doctors 52 times? A. Approximately.

Q. Can you give us approximately the cost of each time going there, the transportation cost? A. I would estimate,

I usually would go by bus, sometimes however it was
52 necessary to take a cab, but it would be about a
dollar each time that I would go, so it would be
over \$50, about.

Q. And when you went by public transportation, did you
tell me that you would have to use more than one bus? A.
Yes, sir, three different buses each way.

Q. Three buses each way? A. Yes, sir.

Mr. Cramer: Your Honor, I now have medical bills
which I would like to introduce in evidence. I am wonder-
ing whether Your Honor would just like to group them
together, with a large clip that I have, and just denominate
them as Plaintiff's Exhibit 1?

The Court: I have no objection, whatever way you
want to do it.

By Mr. Cramer:

Q. I show you this and ask you to tell me what it is?

A. This is a doctor bill from Dr. Koth, who was the
surgeon that I have been visiting.

Q. What is the amount of the bill? A. \$240.

Q. I show you this and ask you to identify it. A. This
is an X-ray that was taken in Dr. Bullock's office, the
amount is \$10.

53 Q. Please identify this. A. This is a bill from
Dr. Ostergard, the bill is for \$10.

This is a bill from Dr. Lewis, in the amount of \$40.

Q. Dr. Lewis is the neurologist that you said treated
you? A. Yes, sir. This is a bill from Northern Virginia
Doctors Hospital, in the amount of \$202.01. There is also
a \$17 fee which I was asked to pay when I left the hospital,
for the anesthesiologist.

Q. Keeping your voice up and a little bit away, what
was the total amount of the bill to the Northern Virginia
Doctors Hospital? A. \$202.01.

The Court: Did you say \$202?

The Witness: Yes, Your Honor.

By Mr. Cramer:

Q. Plus the \$17? A. Yes.

Q. So the total amount is \$219? A. Yes.

54 Q. Please identify this. A. This is a bill from
Arlington Hospital for X-rays that I had there,
in the amount of \$10.

Q. All right. A. This is a bill from the physical therapist, the total amount is for \$165.

Q. What is her name? A. Dr. Buchanan.

Q. And she is a physical therapist? A. Yes, sir.

The Court: What is the amount?

The Witness: \$165.

By Mr. Cramer:

Q. All right. This bill? A. This is for the X-ray that I had at Arlington Hospital yesterday.

The Court: Keep your voice up, please.

By Mr. Cramer:

Q. Say it again. A. This is a bill I received yesterday from the Arlington Hospital for X-rays that I had there.

Q. These are the X-rays taken yesterday that you alluded to in your examination? A. Yes, sir.

55 The Court: In what amount?

The Witness: \$9.

By Mr. Cramer:

Q. Please identify that. A. This is a bill from Northern Virginia Doctors Hospital.

Q. This is another bill from Northern Virginia Doctors Hospital? A. Yes, sir.

Q. Is it different from the other one given? A. Yes, sir.

Q. What is the amount? A. \$17.

Q. All right. Now, these next documents that I show you are what? A. Prescriptions that I received from the doctors.

Q. Are these receipts, actually, for the prescriptions?
A. Yes, sir.

Q. All right.

Mr. Cramer: Would it then be all right, Your Honor, for the plaintiff to go in order and read the name of the drugstore, the dispensary and the amount?

The Court: Yes.

56 The Witness: The first one is from Drug Fair for \$2.50.

The Court: \$2.50?

The Witness: Yes, ma'am. The next one is from Drug Fair in the amount of \$2.50.

The next one is from Wahlgreen's, in the amount of \$1.35.

The next one is from People's Drugstore in the amount of \$2.05.

The next one is from People's Drugstore in the amount of \$2.20.

The Court: Twenty cents?

The Witness: \$2.20. The next one is from Thomas McKotchy (?).

By Mr. Cramer:

Q. Is that a drugstore? A. Drugstore, \$1.40.

Q. \$1.40? A. Yes. The next one is from Bell Drugstore, for \$1.75.

The next one is from People's Drugstore and it is for \$1.65.

Mr. Cramer: I ask that they be marked Plaintiff's
57 Exhibit 1.

The Clerk: Two.

Mr. Cramer: Two, yes, thank you. And I have given them to defense counsel, Your Honor.

The Court: All right.

Mr. Cramer: I ask that these be introduced in evidence.

The Clerk: Plaintiff's Exhibit No. 2 for identification.

The Court: Admitted.

The Clerk: Plaintiff's Exhibit No. 2 received.

(Bills were marked Plaintiff's Exhibit No. 2 and received in evidence.)

By Mr. Cramer:

Q. One last question from me, prior to the accident of August 12, 1962, did you ever, previous to that date, incur an injury to your left hand? A. No, sir.

Q. Previous to that date, did you ever have a bone injury? A. No, sir.

Q. Did you ever have a nerve injury? A. No, sir.

Q. And you were never a plaintiff or a claimant
58 in any lawsuit, were you? A. No, sir.

Q. For a claim of any type? A. No, sir.

Mr. Cramer: I have no further questions, Your Honor, excepting this. I would like to have admitted and identified right now as Plaintiff's Exhibits 3 through 5, records from the Department of Air Force concerning an extract of Miss Stull's leave record since the date of the accident, August 12, 1962. I filed a subpoena against the Department of Air Force and I was told by them that under Rule 44 of the Federal Rules of Civil Procedure this is quite common, under their seal.

The Clerk: Plaintiff's 3, 4 and 5, for identification.

The Court: Yes. Have you shown them to the others?

Mr. Cramer: Not yet, Your Honor. I might say, Your Honor, as the plaintiff testified, all of the times shown in these records, of course, are not taken off for the accident, just a certain portion of them.

Mr. Gregg: No objection, Your Honor.

The Court: Very well, admitted, Plaintiff's Exhibits 3, 4 and 5.

Mr. Cramer: Nothing further from the plaintiff, Your Honor.

59 (Miss Stull's leave records were marked Plaintiff's Exhibits Nos. 3, 4 and 5 and received in evidence.)

Cross-Examination

By Mr. Gregg:

Q. Miss Stull, do you recall when your deposition was taken in connection with this case in July of 1964? A. Yes, sir, I do.

Q. Do you recall at this time whether your physical condition has gotten better or worse since that day? A. I was having trouble at that time with my hand but not as much as I am having right now.

Q. In other words, your hand has continued to get worse? A. Yes, sir, it has bothered me more.

Q. Have you told this to your doctor? A. Yes, sir.

Q. Your doctors did perform one operation, did they not? A. Actually two, sir.

Q. What were the two? A. The first one was done in Dr. Koth's office under a general anesthesia, that is when he performed the biopsy.

60 Q. You consider a biopsy an operation? A. Yes, sir. After the operation I was sent back to the physical therapist because the movement of my hand, I had lost the movement again, I did have my hand in a splint and in a sling, I did have stitches in my hand.

Q. Now, you understood that the purpose of the last operation was to clear up, at least as well as medically possible, the condition that you had in connection with your thumb? A. I was not under that impression, sir, no. Dr. Koth had taken the X-rays and advised me that I had a tumor in the left hand. He operated to remove the tumor. I was under no—well, he operated to remove the tumor, he didn't tell me that he would be able to clear up all the trouble I have with my hand, no.

Q. Were you having more trouble before the operation or after the operation? A. I had trouble before the opera-

tion and I am having trouble now, is really no considerable difference.

Q. As far as you can see, then, there was no advantage to you so far as the operation was concerned?

Mr. Cramer: I am going to object, Your Honor, that calls for a medical opinion.

The Court: She hasn't said that, anyway.

61 The Witness: I don't understand.

Mr. Gregg: This is cross-examination.

The Court: I realize it is, but even in cross-examination you are not to state a conclusion for her.

Mr. Gregg: My purpose in asking that question, Your Honor, was to find out if she agreed with it or disagreed with it.

The Witness: I don't understand the nature of your question, sir.

The Court: Suppose you restate your question.

Mr. Gregg: I will abandon that point for the time being, Your Honor.

The Court: All right.

By Mr. Gregg:

Q. Would you hold up both of your hands, Miss Stull, and show them toward the Judge. Now, this injury was to your left hand, was it not? A. Yes, sir.

Q. Open your hand up, that is the way. Open your thumbs up, spread your hands equally. A. I can't spread this one as much.

Q. Just show us where the area of the injury was. A.

At the time of the accident—

62 The Reporter: I can't hear you.

The Witness: I was cut from the area up in here in front of the thumb down around the base of the thumb down to here.

By Mr. Gregg:

Q. We can still see the remains of that scar in that area, can we not? A. Yes, sir.

The Court: Where is that, that you said you had a tumor?

The Witness: This is the scar from the tumor. Dr. Koth cut from this area all the way down around here.

The Court: Is this from the tumor?

The Witness: This was the second operation, the tumor removal, and right here is where the lump is now, can you feel the lump there, right here?

The Court: Just a minute.

The Witness: This is causing my hand lately to ache so, it is really causing me so I am unable to type.

The Court: Now, you speak loud enough for the reporter to hear what you say.

By Mr. Gregg:

Q. Holding both hands up again like this toward
63 the Court, would you make a fist with both hands.

Now, would you put your thumbs inside. Can you bend your thumb? A. Like that?

Q. Now, bring your hands down over it.

The Court: Your thumb, are you able to touch just below the little finger?

The Witness: I can bring it up.

The Court: Now, let's see the other one.

(The witness demonstrated.)

By Mr. Gregg:

Q. Now, at the time of this accident, you testified that you were a GS-5? A. Yes, sir.

Q. And you are still at GS-5? A. Yes, sir.

Q. I gather from the wage rate that you have given us in connection with the time that you lost from work, that you were earning \$2.09 an hour at the time of the accident? A. Yes, sir.

Q. And the next wage loss was computed on the basis of \$2.20? A. Yes, sir.

64 Q. Then \$2.28? A. Yes, sir.

Q. And \$2.56 an hour? A. Yes, sir.

Q. And the last period of time that you lost that you connected with this accident, you computed the basis of \$2.64 per hour? A. Yes, sir.

Q. Does that mean that you have gotten in-grade promotions within your grade? A. I have received three—two in-grades since the accident. The other ones are pay raises for the government.

Q. Now, do you have your efficiency rated by your employers in connection with your occupation? A. We are rated for—

The Reporter: What was that, please?

The Witness: We are rated for efficiency, yes, sir.

The Court: Now, you ought to speak up a little louder because the reporter has gotten as close to you as she can get and is still having difficulty getting what you are saying.

By Mr. Gregg:

Q. Do you recall, at the time of your deposition, your efficiency ratings were uniformly satisfactory? A. Yes, sir.

Q. What have been your ratings since the deposition? A. Satisfactory.

Q. You have been working in the same office? A. Yes, sir.

Q. Doing the same type of work? A. Yes, sir.

Q. And for the same department or division, or whatever it is, in the Air Force? A. Yes, sir.

Q. Now, did you also say that you are now going to night school? A. Yes, sir.

Q. What are you taking at night school? A. I have been going to night school since last spring with the University of Maryland and I am currently taking sophomore English.

Q. In other words, you are taking college courses? A. Yes, sir.

Q. And you said that you got tired or your arm got tired or your hand got tired after carrying six books on a

loaded bus? A. It is not a question of getting tired,
66 it is a question of the pain in my arm.

Q. Pain in your arm? A. Well, in my hand. Holding anything heavy, trying to hold anything heavy, puts pressure on my hand, you know, holding onto them.

Q. The injury that you suffered here was a cut in the area of your left thumb? A. Yes, sir.

Q. And you have a scar to show for that? A. Yes, sir.

Q. Now, since that time you have been operated on once and now you have an additional scar showing the site of the operation? A. Yes, sir.

Q. Now, your lawyer asked you whether there were other times—you had already testified about the period of the times when you suffer pain? A. Yes, sir.

Q. He then asked if there were any other times when you suffered pain and you indicated that you even felt pain at night when you were sleeping? A. Yes, sir.

Q. My question is this: Are there any times when
67 you don't have any pain? A. No. I have considerable pain now most of the time.

Q. Twenty-four hours a day? A. When I am awake and I know of it, yes, sir.

Q. Didn't you testify previously that you even had pain when you are sleeping? A. Yes, sir.

Q. So that you even feel that pain when you are asleep? A. I will wake up with the pain sometimes, sir.

Q. Do you recall when your deposition was taken and the questions were asked as to what times you felt at a disadvantage with respect to your hand? A. Yes, sir.

Q. Do you recall testifying at that time that you felt pain at night infrequently? A. At that particular time, sir, perhaps it was infrequently.

Q. Do you recall testifying that although you had pain in your hand with a lot of typing, that this was not an every day occurrence? A. No—I don't know how to phrase it. I have a copy of the questions that were sent to me as

part of the deposition. I was asked to keep a copy.
 68 But in listing my answer to you, I told you that I did
 suffer pain from typing, however, I also had pain
 when I wasn't typing.

Q. This is what I had in mind, Miss Stull, on page 29
 of your deposition, line 17, this question was asked:

"Do you actually have trouble every day with this thumb
 at work?

"Answer: No. I don't, for the simple reason that every
 once in awhile we have a period where we don't have that
 much work, and it is just routine—"

A. That is correct.

Q. In other words, unless you are involved in activity
 that involves constant use of that thumb, it doesn't bother
 you, is that right? A. Let me tell you in addition to that—

Q. No, I don't— A. You don't want to hear it?

Mr. Cramer: Your Honor, I think the witness is entitled
 to give Mr. Gregg a full answer.

Mr. Gregg: I am entitled to a responsive answer, Your
 Honor.

The Court: Yes, of course. You may answer, but you
 are to answer what he has asked you and not to add some-
 thing that is not a part of the answer.

69 Now, read the question.

(The question was read by the reporter as follows:)

"In other words, unless you are involved in activity
 that involves constant use of that thumb, it doesn't
 bother you, is that right?"

The Witness: Am I allowed to answer now?

The Court: Yes.

The Witness: At the time of that deposition, my office
 was located on the fourth floor and we were a branch within
 a division. At this time and for the last year, we have been
 a division, we were reorganized. The position which I
 now hold requires almost 90% of typing, in my position
 right now.

Mr. Gregg: Would the reporter read back the answer that had been given to the question previously?

The Court: You mean the answer which was objected to?

Mr. Gregg: She had answered my question previously, Your Honor, before counsel objected.

The Court: All right. See if she had previously answered; if so, read the answer.

(The record was read by the reporter as follows:)

“Answer: Let me tell you in addition to that—

70 “Question: No, I don’t—

“Answer: You don’t want to hear it?”

The Witness: I didn’t understand the question, I am sorry.

By Mr. Gregg:

Q. Getting back to the date of the accident—I notice that you are not wearing glasses today? A. No, sir, I am not.

Q. Do you wear contact lenses? A. Yes, sir, I do.

Q. Are you wearing them right now? A. Yes, sir.

Q. And is the purpose for your wearing contact lenses difficulty in reading things at close range or difficulty in seeing things at a distance? A. No, it is for close work, sir.

Q. You have no difficulty, then, seeing things that are off at a distance? A. No, sir. The close work is where I have the most trouble, for reading, et cetera.

Q. Then you had no difficulty seeing the two boats or rather the boat of Mr. Engle prior to the accident? A.

No, I could see Mr. Engle’s boat on the water fine.

71 Q. Now, the occasion for this boat trip was what?

A. The occasion for the boat trip?

Q. For the purpose of a picnic or joint outing or something of that nature? A. At the time of the boat activity that we planned, my roommate’s sister was visiting us from Maine. My roommate is a friend of Mr. Long’s and I had been invited on the outing by my roommate.

Q. Did you know in advance where the outing was to be, where you were to go? A. We planned to take a trip to Marshall Hall, to the amusement park.

Q. Who had planned that? A. My roommate and her friend.

Q. And did you engage Mr. Engle and Mr. Stull to go along with this? A. Sir, I don't understand. What was your question? Will you repeat it?

Q. You said that you intended to take your roommate's relative to Marshall Hall. A. Not I, sir, my roommate had planned to take her sister to Marshall Hall on Mr. Long's boat and I had been asked to join them.

72 Q. In other words, you were just going, then, down as far as Marshall Hall? A. Yes, those were the plans.

Q. And those were the plans on the morning prior to the trip? A. Yes, sir.

Q. And did there come a time when the plans were changed? A. Well, Mr. Long was at the boatyard working on Mr. Engle's boat, they were unable to get the windshied on it. So we waited around the boatyard until after 12 o'clock, and when we reached Marshall Hall, everyone decided that—I was under the impression we were to go on to Piney Point.

Q. Who was to go on to Piney Point? A. The two groups of people.

Q. Had there been a discussion about where you would go and how you would get there? A. Yes, sir, we were going by boat.

Q. Who engaged in the discussion? A. Well, my roommate, I was solely at the invitation of my roommate, I was with them.

Q. Did you hear anybody saying we will go to Marshall Hall and then we will go to Piney Point? A. My roommate had asked me, she said, we are planning
73 to take Susan up to Marshall Hall, she was a passenger on our boat, and she asked me would you like to go along and I said of course I would.

So that Sunday we left, the three of us, for Mr. Long's boatyard.

Q. And then there was some delay while Mr. Engle's windshield was being put on? A. Yes, sir. They were unable to get the windshield on, he went without it, to my recollection.

Q. So then both boats left Mr. Long's boatyard at approximately the same time, is that right? A. Yes, sir.

Q. Was there any discussion before the boats left as to where you would go and how you would get there? A. I wasn't driving the boat, sir, I was a passenger. I was at the invitation of my roommate, I was with them.

Q. Where did you understand the boats were going? A. I understood we were going to Marshall Hall.

Q. For what purpose? A. To go to the amusement park, I presume.

Q. Did the boats ultimately arrive at Marshall Hall? A. Yes, sir, first we stopped for gas.

74 Q. Where was that? A. I don't know what they call it, along the pier where they fill boats with gas.

Q. After getting gas, where did you go? A. We proceeded on the Potomac south to Marshall Hall.

Q. And during the time that the boats were traveling down river toward Marshall Hall, you were a passenger on Mr. Long's boat? A. That is correct, sir.

Q. And Mr. Engle's boat was also in the same area going in the same direction? A. Yes, sir.

Q. And can you tell me anything unusual about the operation of the boats as they approached Marshall Hall? A. Unusual? I would say our boat, Susan had taken pictures of the ship, the Bounty.

Q. I am referring now only to the operation of the boats and the manner in which they appeared to be operating.

The Court: Could you fix this time?

Mr. Gregg: This was as they were approaching Marshall Hall after having left, after gassing up.

The Witness: We were close in the water in relation to the two boats, you could easily see Mr. Engle's boat from Mr. Long's boat, we were traveling more or less, not exactly side by side, but close by each other
75 until we reached Marshall Hall.

By Mr. Gregg:

Q. Whose boat was in front of the other boat? A. I recall Mr. Long was a little bit in front of Mr. Engle on the way up. I could see Mr. Engle's boat in back of us somewhat, not too far behind us.

Q. You ultimately arrived at Marshall Hall? A. Yes, sir.

Q. And did anybody get off the boat at Marshall Hall? A. No, sir, we stopped in the water for a few moments.

Q. Close to each other? A. Yes, sir.

Q. The two boats were close to each other? A. Yes, sir.

Q. And was there a discussion at that time? A. Yes, sir.

Q. What was decided at that time? A. It was decided that we would go on up the river.

Q. Decided by whom? A. The two occupants of the boats.

Q. You mean the two owners? A. The two owners, the two drivers.

76 Q. Did anybody ask your opinion, for example, as to where you should go or how you should get there? A. No, sir.

Q. The only discussion was between the two operators? A. Everyone was talking at the time. I don't recall the exact conversation.

Q. Did it appear to you that it ended up in a mutual agreement? A. Yes, sir. I was just under the impression that we weren't going to stop, we were going to go on up the river.

Q. And you were to go on up the river together, the two boats together? A. More or less, like going on a trip.

Q. And ultimately there came a time when the boat in which you were a passenger left the area of Marshall Hall? A. Yes, sir.

Q. And is it your testimony that sometime later the Engle boat left the same area? A. Yes, sir. I could see Mr. Engle's boat where we left the area that we had been in, in the water. I could see his boat, it was still sitting there and our boat started on out ahead.

Q. Then you saw the Engle boat approaching from
77 the rear? A. Yes, sir.

Q. And overtaking you? A. Yes, sir.

Q. And it actually passed the boat in which you were a passenger? A. Yes, he got up almost to where he was going to pass us.

Q. In the position indicated on the blackboard? A. Yes, sir.

Q. And then all of a sudden the boat swerved sharply to the right? A. Yes, sir.

Q. Did you see anything that caused that to occur? A. I can't explain the feeling that came over me when I saw it.

Q. I am asking you if you saw anything, if you observed anything? A. If I observed anything funny?

Q. If you observed anything that caused the boat to swerve sharply over?

Mr. Cramer: I am going to object, Your Honor, on the ground that the plaintiff is not an expert in boatmanship. We will offer such an expert.

The Witness: I can answer, if you like.

78 Mr. Gregg: Wait a second, the Court has not ruled on the objection.

The Court: You are asking her if she saw anything that what?

Mr. Gregg: That caused the boat to swerve to the right. Perhaps I should rephrase the question.

The Court: I think maybe it would be better to.

By Mr. Gregg:

Q. Did you observe anything in the water immediately prior to the time that the Engle boat swerved sharply to the right? A. No, sir, I didn't.

Q. Did you observe anything unusual just before the Engle boat swerved sharply to the right? A. I saw Mr. Engle coming up the river and all at once his boat turned and I knew he was going to hit us and I heard my roommate, the last thing I remember, she screamed: What does he think he's doing! and he hit us.

Q. You say that you saw Mr. Engle. At this point, of course, Mr. Engle was in front of you. A. Let me explain. Mr. Engle's, as I have testified earlier, boat was skipping along the water. It happened so fast that I saw him coming and all at once he was there and I knew
79 he was going to hit us, that's all I can tell you.

Q. You are still saying, are you not, that the Engle boat had almost completely passed the Long boat before it swerved abruptly to the right? A. Yes, sir. He come up alongside of us and when he turned in, we were right there when he turned.

Q. During the time that the Engle boat was approaching from the rear, did the boat in which you were a passenger speed up or attempt to go faster? A. No, sir.

Q. To your knowledge or to your observation, was Mr. Long, the operator of the boat in which you were a passenger, looking at the Engle boat? A. No, sir, Mr. Engle was behind us. Mr. Long was operating our boat, how could he possibly keep his eyes on Mr. Engle's boat and drive his boat at the same time?

Q. Your answer to the question, then, is that Mr. Long was not looking around at the Engle boat as it was approaching or as it was passing? A. No more than I guess in driving a car, sometimes you look in the rear view mirror, I am not familiar with boats that much to know. I imagine he was keeping track of the boats in the area, I don't know. I was facing the opposite direction.

80 Q. Are you saying that you saw Mr. Long not looking at the Engle boat or are you saying that you imagine that he was looking at it, or what are you saying?

A. I will explain something here. I don't know if it will help. Right before the accident, my roommate was sitting up on the bow of the boat in front of the windshield. Right before the accident occurred, Natalie got off the bow of the boat and got inside the boat and Susan took her place. Because of this, we had slowed down to where we weren't moving hardly at all; you can understand that, for the two to change positions, we were going very slow and just as my roommate got inside the boat is when I looked up and I saw Mr. Engle coming and that is when she screamed: What does he think he's doing?

Q. At that time he was coming at a sharp angle directly over toward your boat? A. Yes, I knew he was going to hit us.

Q. Tell me this, do you know which way Mr. Long was looking at the time that the Engle boat started its sudden swerve to the right? A. No, sir, I don't. I couldn't definitely sit here and say that. I know that the boat turned somewhat.

Q. The boat in which you were a passenger? A. Yes, sir, he turned to the right.

81 Q. Now, following the accident and following your returning to your home, did you go to work, let's see, this accident occurred on what day? A. On the 12th day of August, 1962.

Q. Was that a Sunday? A. Yes, sir, it was.

Q. Did you go to work the following day? A. No, sir, the following day which was Monday, I called my physician and reported to Dr. Mandamis' office for an examination.

Q. When was it that you first returned to work following the accident? A. I believe I returned to work on a Thursday of that week, which would have been the 16th and I was off the 17th in the afternoon to go and have the stitches removed.

Q. And then you returned to work the following day, the following work day? A. Sir, let me explain something right now. This is three years ago.

The Reporter: Three years ago?

The Witness: These records that he now has in his hand are three years old. I cannot sit here and tell you exactly what day I was out. However, personnel sent me
82 a copy of the papers you have in your hand and I have marked them, I have a copy of them right here, and I can give you the dates exactly, if you like.

Mr. Cramer: Your Honor, what the plaintiff is saying is this, in preparation for the trial—

The Court: I understand what she said.

Mr. Cramer: I think it is not out of line, if I may say, Your Honor, for me to request that she be allowed to look at her papers.

The Court: Well, if she needs to refresh her recollection, she may look at the papers.

Mr. Gregg: My only point in asking these questions, Your Honor, is to find out what days she missed completely following the accident.

The Court: What days she missed completely?

Mr. Gregg: What full days she missed immediately following the accident.

The Court: Yes. Tell him what full days you were out.

The Witness: After the accident, I missed Monday, Tuesday and Wednesday. I returned to work, I believe, on Thursday and on Friday afternoon I left to go to Dr. Koth's office to have the stitches removed.

83 By Mr. Gregg:

Q. And thereafter until your operation, you continued to work every day, although there were some days you took off part of the day to go to the doctor? A. I know there were days and afternoons when I left the office because of my hand, not because of visits, but just because my hand was bothering me.

Q. But the only full days that you missed were those immediately following the accident, is that correct? A. No, sir.

Q. And after the operation? A. Yes, after the second operation I missed three weeks almost completely.

Q. This was before you went back to work at all, following the operation? A. Yes.

Mr. Gregg: I have no further questions.

Mr. Carr: Your Honor, do you want me to start before the luncheon recess?

The Court: Unless you want to start it after.

Mr. Carr: I don't think that in fourteen minutes I will conclude, there will be a split in the testimony.

The Court: That doesn't matter unless you have
84 some objection.

Mr. Carr: It doesn't bother me, Your Honor.

The Court: All right.

Cross-Examination

By Mr. Carr:

Q. Miss Stull, let me take you back to the actual date of the accident, the time of the accident, and if I may develop some of the relationships here so the Court will understand who the people are—A. Yes, sir.

Q. Isn't it true that you actually were rooming with Natalie Colburn who is now Mrs. Long? A. Yes, sir.

Q. And that Susan Colburn was the sister of Natalie, who lived in Maine, right? A. Yes, sir.

Q. Now, prior to this particular day, you had been on the river on many occasions with Mr. Long and probably Natalie, isn't that also true? A. Yes, sir, I had been invited with Natalie and Tommy along with them.

Q. In other words, this was not your first trip in a
85 powerboat or a motorboat? A. No, sir, it wasn't.

Q. Had you ever been in this particular motorboat before? A. No, sir, I don't believe I had, not in Tommy's boat, no.

Q. You had some experience, though, of going up and down the river in a power or motorboat? A. Yes, sir.

Q. Did you also know Mr. Engle before the accident occurred? A. Yes, sir, I knew Mr. Engle and I had been in his restaurant. He had been down on the boat at the boatyard several times when I had been there with Natalie, working on his boat, during the winter.

Q. Had you ever been in his boat as a passenger? A. No, sir.

Q. Directing your attention to this particular day, I believe you said it was a very, very nice day? A. Yes, sir, it was.

Q. Would you say the water was fairly calm? A. It was choppy, I'd say. Well, it depends on the area you were in, in the water. When we got to the area where the Bounty was, there were a lot of boats around in that area,
86 the water was choppy there.

Q. Let me stop you there for a moment. When you refer to the Bounty, this is the boat I believe you testified was used in the filming of the picture, "Mutiny on the Bounty," right? A. Yes.

Q. That was tied up in the river some distance north of Marshall Hall? A. Yes, sir.

Q. In other words, it didn't happen anywhere near where the accident occurred? A. No, sir.

Q. After you left the area of the Bounty where I believe some of you took pictures, isn't that true? A. Yes, sir.

Q. You proceeded to Marshall Hall, made a very short stop and then proceeded on to where the accident actually occurred? A. Yes, sir.

Q. Directing your attention to the area near where the accident occurred, how was the water at that point? A. I'd say it was choppy, the water certainly wasn't calm.

87 Q. Describe what you mean by choppy, you mean it has little waves in it? A. Yes, sir, I would say so.

Q. Could you estimate the height of these waves? A. No, sir, I am sorry, I am very poor at that.

Q. Were they caused by the wind, would you say, or by the boats, or by both? A. It could have been both, it was windy, not real windy but there was a breeze that day.

Q. You still considered this a pleasant day as far as boating was concerned, wouldn't you say so? A. Oh, yes, sir, the sun was beautiful.

Q. Now, I am going to go to the board here, if I may. A. Yes, sir.

Q. This is a very rough diagram of a powerboat. Let's assume that this is the powerboat that you were in, the Long boat. A. Yes.

The Court: Would you make your marks a little darker, please.

Mr. Carr: Yes, I am sorry.

By Mr. Carr:

Q. This is the Long boat and this would be the
88 bow of the boat, do you understand that? A. Yes, sir.

Q. Did it have an area up front, a cowl where you could sit? A. Yes, sir.

Q. Then it had a cockpit, isn't that true, where the people are, where the seats are? A. Yes, sir.

Q. Now, I realize that this is not an accurate diagram but do you understand at least that this represents a powerboat? A. Yes, sir.

Q. Similar to the one operated by Mr. Long on that day? A. Yes, sir.

Q. Did it have a windshield on it? A. Yes, sir.

Q. Now, where were you sitting, assuming this to be the Long boat, where were you sitting in the boat? A. From what you have drawn, there was a roof on the boat.

Q. You mean a hatch over the engine? A. No, no, I mean over top of where the seats were, up in front of the engine, there was a small canvas roof like, I am not

sure I am giving you the right term, but I was seated
89 about midway of the boat, not quite, back further.

Q. Why don't you come show us where you were seated in the boat.

(The witness went to the board and made a drawing.)

The Witness: This is where the engine is and there is a hatch cover on top of the engine which was padded like a seat and I was sitting up on top of this, in the middle of the boat.

By Mr. Carr:

Q. You are indicating that you were sitting on top of the padded engine cover about in the middle of the boat?

A. Yes.

Q. In what direction were you facing, forward, aft, right or left? A. I was facing so I could see the boat behind us.

Q. Am I right in saying that your legs would be hanging down on the back side of this engine hatch? A. Yes.

Q. If you looked straight ahead, you would be looking back over the back of the boat, is that true? A. Yes.

Q. Were you sitting in this position at the time
90 the accident actually occurred? A. Yes, sir.

The Reporter: I am having a hard time hearing her.

The Court: We are having difficulty hearing what she is saying. Does she need to stay there long?

Mr. Carr: Not really, Your Honor, I think it would be better if she returned to the microphone.

(The witness returned to the stand.)

By Mr. Carr:

Q. Miss Stull, you have testified that you were sitting here looking to the back of the boat? A. Yes, sir.

Q. You were in this position, approximately the same position at the time the accident occurred? A. About that position, I know I had turned around, I turned around and

I saw my roommate changing positions and Susan was going out in front of the boat.

Q. I believe you testified before that sometime prior to the accident Natalie and Susan changed positions in the boat? A. Right before the accident.

Q. Had they already completed this change when the accident occurred? A. They had just completed the
91 change and as Natalie come around in front of the windshield to get inside, she of course was looking back toward me and I then, in turn, looked back and I could see Mr. Engle's boat skipping along the water.

Q. Let me stop you there now. Apparently at some time Susan and Natalie sat about in this position on this boat, is that true? A. Yes, sir.

Q. Now, prior to the accident, apparently Natalie had been sitting there? A. Yes, sir.

Q. And she changed places with Susan who went back here in the boat somewhere? A. Yes, sir.

Q. Natalie had returned to the cockpit of the boat, is that true? A. Yes, sir.

Q. Had she re-taken a seat in the boat by the time the accident occurred? A. As I recall, she came into the boat and she was standing and that is when she screamed: What does he think he's doing? And that's when I looked and I could see his boat coming right in to hit us.

Q. Was this the first time that you had noticed the
92 Engle boat after you left Marshall Hall? A. No, sir, I had noticed it before, you know, him coming along behind us in the water.

Q. That is when you said he was skipping? A. Yes, in fact later after the accident I told Mr. Engle, as we sat in the Fort Belvoir Marina that he should have named his boat the Dolphin because his boat was actually jumping out of the water.

Q. During this period of time when the Engle boat was approaching you from the rear, this is when these movements were being made from the front to the back? A. Yes, sir.

Q. Passengers were changing positions? A. Yes, sir.

Q. At this time when Natalie changed position, you turned to your right, is that true or looked to your right?

A. Yes, sir.

Q. You testified that somewhere along the line here, the Engle boat actually passed or started to pass the Long boat, isn't that correct? A. Well, I saw him coming. When he hit us, though, I didn't know that he had passed us, I am not sure.

Q. Let me take you back to your drawing. You
93 have indicated the relative position of these two boats. Is that an accurate diagram, to the best of your recollection? A. When I saw Mr. Engle, his boat was coming up towards us. The next time I saw him, he was coming directly at us, like his boat had sort of turned.

Q. Assuming that this drawing is your recollection, can you give us any idea of the distance between the two boats when they were both parallel to each other? A. I'd say about a car length, a car length and a half at the most.

The Court: The length of an automobile, is that what you are saying?

The Witness: Yes, ma'am. I am no real exact judge of distance but that's what I would say.

By Mr. Carr:

Q. As the Engle boat came up here and you have indicated passed about a car's length away from your boat, did you have him under observation this entire time?

The Court: Just a moment, I think you misquoted her.

Mr. Carr: Did I misquote her that time? I think I did.

By Mr. Carr:

Q. As the Engle boat came up from the overtaking
94 position— A. Yes, sir.

Q. Is it your testimony that when the boats were in these relative positions, he was about a car length away?

A. A car length, maybe a little over a car length, not two car lengths, to my estimation.

Q. Now, taking you at that very moment in time when they were one or not quite two car lengths apart, were the boats still going in the same direction? A. Yes, sir, they were going in the same direction until Mr. Engle swerved and I saw his boat turn sort of funny so that you could see the bottom of his boat.

Q. You actually saw this, is that right? A. Yes, sir.

Q. At the time you saw this, taking you back to your engine hatch, I assume you were looking to your right, is that true? A. Yes, sir, I guess I must have been.

Q. Possibly even looking a little forward, to the right of the boat? A. Yes, sir.

Q. Did you have any difficulty seeing the Engle
95 boat and the movement it was making? A. No, sir.

Q. Now, taking you back to this boat and prior to the accident, what was the speed of this boat, if you know? A. I don't know, sir. I know that we were going slow, very slow, because like I said, they were changing positions and I am no judge of speed. I know we were going very slow it seemed like we were hardly moving at all in the water.

Q. Wasn't it your testimony at the time of the deposition that you were traveling at such a slow speed that you felt the girls could have hung their legs in the water, if they wished? A. That's true, we were hardly moving, if we were moving at all in the water.

Q. Now, at the time the Engle boat made this movement that you said you saw, the sharp right, did you feel the Long boat make any movement? A. Mr. Long attempted to turn his boat to the right.

Q. Did you feel this turn? A. Yes, sir, I knew, I could tell that he had moved the boat slightly.

Q. But the boats still came together? A. Well, we were
96 going so slow, the speed he had at that time, moving the boat wouldn't have done that much, in my estimation.

Q. But it is your recollection today that his boat started to turn to the right? A. Yes, sir.

Q. Now, after the accident occurred, you were in the water a substantial period of time, isn't that correct? A. Yes, sir.

Q. Isn't it also correct that the difficulty was that they were having a hard time getting you into a boat with your hand cut? A. Well, sir, I was a lot bigger than I am now, I weighed a lot more, that added to it, and the fact, if you can understand, looking up at the boat, all that was out of the water was my head and my shoulders, perhaps, and the boats were very high from that position. There were no ladders and I couldn't help them at all because of my left hand.

Q. Were people trying to help you at this time? A. Yes, sir, they were trying real hard to get me out.

Q. They were doing everything they could to help you out of the water? A. Yes.

The Court: Do you swim?

The Witness: I swim, Your Honor, but I am not
97 a very good swimmer.

By Mr. Carr:

Q. I believe they were throwing life preservers, too, were they not? A. Yes, sir.

Q. And somebody in the water tried putting one on you, didn't they? A. Laura, the girl who had been in our boat—

Q. Did she succeed? A. She started to put it on and that's when I brought my hand out of the water and the blood went all over and down my arm and she screamed that I was hurt.

Q. Let me take you back a moment. You testified before that as you approached the vicinity where the accident occurred, that there were maybe ten to fifteen boats in the area, one to two city blocks away? A. Yes, sir, about that, I know there were a lot of boats in the area.

Q. When you say in the area, do you mean all around this portion of the river? A. Yes, sir, all around in the area.

Q. Am I right in saying at this particular point, the river is quite wide, several blocks wide, is that
98 right? A. I can't recall how wide the river is there.

Q. But these fifteen boats were in an area, though, that encompassed one or two city blocks, isn't that true? A. That was my judgment on it, it is probably poor, but that's what I would say. There were boats passing us going in both directions, there were boats going in the direction we were going in and there were boats going in the opposite direction.

Q. Were boats passing you going in the same direction you were going in? A. Yes, sir. I can't remember any passing us, though, right at the particular time of the accident.

Q. Let me take you back to the time you left Marshall Hall, to the time of the accident, do you remember any boats passing you at that time? A. Yes, sir.

Q. And there were also boats going in the other direction? A. Yes, sir.

Q. Do you remember any boat passing between the two boats? A. No, sir, I don't remember a boat passing in between us. It could be possible one did and I didn't see it.

Q. Now, as you sat here on the engine hatch and
99 saw this whole thing happen, did you feel any apprehension at all before you saw the Engle boat make this sharp right turn? A. You mean when he was going to hit us?

Q. Any feeling of fear whatsoever, did you feel any fear at all before you actually saw this Engle boat do a sharp right? A. I did. When I saw him coming, I figured, I had a feeling that he was a little bit too close to be going at the speed that he seemed to be going at.

Q. Where was his boat when you first felt this feeling that you had? A. He was back, I am no judge, when I

first saw Mr. Engle's boat, he was further away from me that what that wall is back there, I would imagine, and I could see his boat skipping along the water.

Q. That is the first time that you saw him since you left Marshall Hall? A. Yes, up to where he was getting up closer to us, yes, sir.

Q. And you felt apprehension at that time or a fear at that time? A. I had a funny feeling come over me, I don't know exactly why, but I did.

Q. Do you remember making any sort of outcry or calling this to anybody's attention at that time? A.

I can't remember, all I can remember is what my roommate said when she saw his boat coming over.

Q. I want your memory, please, not your roommate's. A. No, I don't remember screaming or crying.

The Court: We will recess now for lunch and the recess will be until 1:45.

(The luncheon recess was taken from 12.35 p.m. until 1:45 p.m.)

101

AFTERNOON SESSION

(The proceedings resumed at 2 p.m.)

Thereupon—

Emogene I. Stull

resumed the stand and testified further as follows:

CROSS-EXAMINATION

(Resumed)

By Mr. Carr:

Q. Miss Stull, I want to ask you a few questions about your testimony concerning the injury you received. In answer to a question on direct or by Mr. Gregg, I am not sure, you were asked whether or not your typing

ability had been diminished and I believe you answered 20 words per minute? A. Yes, sir.

Q. Am I to gather by that that it has been reduced 20 words per minute? A. Yes, sir.

Q. In other words, assuming you were typing 65 words a minute before, you now estimate you type around 45 or 50, is that right? A. Yes, sir.

Q. Is this something that when the day starts young, are you able to type better then and get progressively
102 slower during the day? A. I start out slower, to begin with, because I have lost the momentum, the rhythm that I had on the keys, I can't coordinate the two hands on the keys.

Q. Now, this lack of coordination is caused only by this feeling of insecurity in your left thumb? A. No, it is not a feeling of insecurity.

Q. Or pain? A. Yes, sir, that is the reason, it is attributed to that fact.

Q. Let's discuss pain for a moment, if we may. At the time your deposition was taken about a year ago, a little over a year ago, it was your testimony that the pain came on around noontime, you remember that? A. Yes, sir.

Q. Was that correct at that time? A. Yes, sir.

Q. Now, is it your testimony today that, since that time and today, that you really feel pain all the time when you type? A. Yes, sir, that is true.

Q. It doesn't come on at noon, it comes on when you hit that keyboard the first time of the day, is that right?

A. Yes, sir.

103 Q. Now, does this pain get progressively worse or remain more or less the same? A. It is like a toothache, it aches, it's about the same.

Q. Does it come and go? A. It depends on what I am doing with my hand. If I should bump my hand or lift anything heavy that I have got to lift, then—

Q. Let me take you back to your typing for a moment. If one types, ordinarily the left thumb would occasionally be used to hit the space bar, isn't that true? A. Yes, sir.

Q. On a right-handed person this is ordinarily done with the right thumb, isn't that correct? A. Yes, sir.

Q. So the left thumb is comparatively dead in the sense it is not used very much in typing? A. Yes, sir.

Q. Now, when you do type and your thumb touches anything, even a part of the carriage or your other hand, does it hurt? A. Yes, sir. To touch anything with the thumb or to have to spread the thumb away from the index finger puts pressure on this nerve here that was injured.

104 Q. How do you hold your hand when you type? Just show me. A. This is how (indicating).

Q. How do you ordinarily hold your hand when you type, before you struck your thumb up in the air like that? A. I hold it down.

Q. About like that, is that about the right distance apart? A. About.

Q. Is that the way you type today? A. No, I keep this thumb up.

Q. Put your thumb back down again. As you type, what would that thumb strike? A. Well, the space bar, your hands are moving up and down up to the higher keys with the numbers on it.

Q. Do you use an electric typewriter? A. Yes, sir.

Q. That doesn't take much pressure to make it work, does it, on the keys, I mean? A. It depends on what keys you are using.

Q. Let's go to the space bar. Assuming that as you type, you touch the space bar with your left thumb, does
105 that hurt? A. With the left hand? I never touch it with the left thumb.

Q. Well, you say it hurts when you do those, so occasionally you touch it to something, isn't that true, when you type? A. Yes.

Q. What do you touch it to, the other hand? A. You mean in moving my hand around?

Q. In moving your hand over this typewriter keyboard?

A. If they were down and I went up to make the numbers on the top row, if I moved it up and I had it down, there is a chance I would hit the bottom keys.

Q. Assuming you didn't cock this thumb up in the air and you moved up and touched another key with that thumb, would that hurt? A. Yes, it would, if I touched it hard.

Q. But a year ago at the time of your deposition, it didn't hurt until after you typed almost all morning, isn't that correct? A. Let me explain this, if I went in and started typing right away, which the job I had then I wasn't typing as much as I am now.

Q. Can we say in all honesty then, that since the
106 time this deposition was taken in July of 1964, July 23, 1964, that your thumb has gotten worse? A. Yes, sir, it has.

Q. Actually you are saying considerably worse, isn't that true? A. Yes, as far as bothering me.

Q. It bothers you all day long when you type? A. Yes, sir.

Q. It bothers you at night? A. Yes, sir.

Q. It bothers you when it is raining? A. Yes, sir.

Q. It bothers you when you pick anything up at all, heavy or light? A. Yes, sir.

Q. So it is almost a constant affair, isn't that true? A. Yes, as much as I use my hand and that is all the time.

Q. Since July 1964, how many times have you seen Dr. Koth? A. Since what date?

Q. July 23, 1964, when your thumb had deteriorated badly, if it has, how many times have you seen Dr.
107 Koth? A. Well, I can't give you the exact number of times. Dr. Koth was off, away from his office, for about three months, his wife, Dr. Lewis, was seriously ill and I was unable to see him at that time.

Q. I have a letter here given to me by your counsel, signed by Dr. Koth, stating in the second paragraph:

Miss Stull was seen in my office for follow up examinations in April of 1964 and again in August and October of 1965.

Now, are those the only three visits you made to Dr. Koth, with the exception of the one you just made yesterday—
A. No.

Q. —since the deposition of 1964? A. I have been to see Dr. Koth more often than that.

Q. He is inaccurate in this particular statement? A. No, I don't mean he is inaccurate, I have seen him previous to just talking with him yesterday. I saw him about a month ago.

Q. Well, he says here October 1965, that is a month ago.
A. Yes, sir.

Q. And you saw him in August of 1965? A. Yes,
108 sir.

Q. About two months ago? A. During that period of time, I went to see Dr. Lewis in the same building, twice.

Q. This particular doctor, the surgeon and the one I have the report from, you have seen him three or four times since April 1964? A. That is correct.

Q. The government sent you a copy of your pay record, did they not? A. Yes, sir.

Q. And you checked this against your own record or your own recollection? A. The doctor bills are my own recollection as to the time that I have taken off.

Q. Did you have any written record at all? A. Of the time that I spent going to the doctors?

Q. Your own private written record of the time you lost from this accident? A. Not a current one. I keep the pay records in my office, I am able pretty much to figure out the time that I have taken off.

Q. Was this personnel record that is Plaintiff's Exhibits 3, 4 and 5, was that prepared in your office? A.

No, sir, it wasn't. It was prepared in the administrative office in the personnel office.
109

Q. Do you have your records? A. Yes, sir.

Q. May I see them, please? A. Yes, sir. If you will notice, I have checked on there with an X.

Q. You have checked on here with an X the ones that are

not connected with this accident? A. May I see it, please? Yes, sir, that is correct, the ones that have nothing to do with the accident are checked off.

Q. These are duplicates of these exhibits, are they not?

A. Yes, sir, they were sent to me by personnel.

Mr. Carr: Your Honor, would you indulge us a moment to see these?

The Court: Yes, certainly.

(Mr. Carr examined the records.)

By Mr. Carr:

Q. Miss Stull, I show you a copy of what has been marked as Plaintiff's Exhibit No. 5. Apparently it is a leave record extending from August 13, 1962, through September 16, 1963, is that accurate? A. Yes, sir.

110 Q. Now, the first entry up there is for 24 hours. I assume that represents the immediate three days after the accident? A. Yes, sir.

Q. Now, directing your attention down to February and March of 1963, and most particularly to February 5, 1963, we show a loss of 8 hours? A. Yes, sir.

Q. Do you have a particular recollection of that day? A. No, sir, I don't. I believe in February I was sent to Arlington Hospital for X-rays. If I remember, I believe I had the X-rays in December, but I returned to Dr. Koth's office.

Q. Well, ordinarily did that take a full day? A. Well, I had to take three buses over to his office and transfer twice.

Q. He is in Arlington, is he not? A. Yes, sir.

Q. And you are coming from the Pentagon? A. Yes, sir, and returning home.

Q. I direct you to February 12th, approximately, in fact exactly one week later, there's another 8 hours. I might as well ask you another one here at the same
111 time. February 19th—

Mr. Cramer: Excuse me, please. I have a witness,

the next witness has come from Cambridge, Maryland, the expert witness has flown here. May I request, Your Honor, that if this is going to be an extended period of time that we can resume with this witness after we hear the expert?

Mr. Carr: I don't think this is going to be extended, Your Honor, I don't have too many to go through, I am not going through every one, just a few.

By Mr. Carr:

Q. Directing you back to February 12th, one week after the other day you lost, we have another 8-hour day, do you remember that particular day? A. Not without my other record, my medical record. I have duplicate bills at home that were mailed to me from the doctors, along with the ones that were sent to Mr. Cramer. During this period here, the daily visits I made to Dr. Buchanan—

Q. That was for physical therapy, was it not? A. Yes, sir.

Q. Did that take a full day? A. Right after this time, I had a lot of trouble with my hand and I did take off a couple of days because of this. Let me explain to you, they had given me a drug for pain which Dr. Koth
112 told me to use, in addition to the sleeping pills he gave me to sleep at night. And the drug I was taking for pain made me very drowsy and the people at work told me to stay home.

Q. That is your recollection why these particular days were missed, because of drowsiness caused by pain pills? A. Yes sir. I went back to work along with taking the pills and I had a lot of trouble while at work while taking the pills, so the people at work said stay home until you are all right and then come back.

Q. Well, it wasn't because of taking X-rays and the three bus transfers, it was because of these pills, is that right? A. That is probably what it is.

Q. About a week or so later, these seem to come in sequences of about a week, we have 16 hours which repre-

sents two workdays. Was that also because of drowsiness caused by these pills? A. I was trying to remember the date of the biopsy and I can't.

Q. Is it possible, Miss Stull—A. I am sorry, there is something I must include that I haven't.

113 Q. I will give you a chance. A. Okay.

Q. Is it possible, Miss Stull, that some of these days, now they go back three years as you said on your own testimony— A. Yes, sir.

Q. —some of these days you may have missed for other reasons? A. No, I would say not, the ones I have checked off are the ones not related to the accident and the other ones are pretty much according to the bills and the time that I had to take off.

Q. Even though they represent full days and on one occasion two full days? A. Yes.

Q. Only one other one I want to ask you about, July 15, 1964, which is a full day—excuse me, yes, July 15, 1964. Do you have a recollection of that particular day? A. July 15th. I believe I went to Dr. Murphy's office one of the days, I am not exactly sure what day I went for an examination by him.

Q. Anyhow, it is your testimony that on any of these days, we have full days missed, that these were missed only because of this pain in your left thumb? A.

114 Yes, sir, or related to activity that I had to be away from work for some reason. I had a blood clot in my left leg as a result of the accident, which I missed days after the accident, about a month later.

Q. Those aren't the days I asked you about, are they? I asked you in February and March of 1963. A. Okay, sir.

Mr. Carr: Your Honor, would you indulge me one moment?

The Court: Yes.

Mr. Carr: I have no further questions.

Mr. Cramer: One question, please, Your Honor.

Redirect Examination

By Mr. Cramer:

Q. You had a blood clot in your leg, is that correct, after the accident? A. Yes, sir.

Q. Which leg? A. The left leg. I had a bruise that covered the entire left leg from the knee up to the top of the thigh.

Q. The bruise covered the left leg from the knee up to the thigh? A. Yes, sir.

115 Q. Now, did you take off some days from work because of that? A. Yes, sir, the bruise was very bad.

Q. You mean it hurt? A. Yes, sir, and about two weeks after the accident, I noticed that I had—I didn't know then that it was a clot but I had a long area on my leg about the length of a new pencil that raised up and stuck out exactly like I had something underneath the skin. I went down to the civilian dispensary and they asked that I immediately go to my doctor, which I did, and he told me it was a blood clot and that I should stay off my legs and he also treated me, gave me antibiotics to help.

Q. Did the blood clot result from the accident? A. Yes, sir.

Mr. Cramer: All right, thank you. I have no further questions.

Recross-Examination

By Mr. Gregg:

Q. What doctor did you see with respect to that condition? A. The blood clot, sir?

116 Q. Yes. A. Dr. Koth.

Q. Dr. Koth's bill which has been offered in evidence— A. I am sorry, it was Dr. Ostergard.

Mr. Cramer: It is \$10, sir.

By Mr. Gregg:

Q. Dr. Ostergard's bill is in the amount of \$10. Would that indicate you saw him once with respect to that condition? A. Yes, sir.

Q. This was the condition that kept you off from work for several days? A. No, I would say I missed, well, I left work in the afternoon to go to the doctor's, I missed the next two days, possibly. I can't recall exactly, sir.

Q. You made one visit, in any event, to see the doctor for this condition? A. Yes, he told me if I had any further development problem to call him.

Q. This was a very painful condition? A. It was painful, I was worried about it, I knew the seriousness of blood clots.

Q. Did it disable you or prevent you from performing your work as a typist or secretary? A. I simply stayed off my legs.

117 Q. For two days? A. Yes, sir, about that.

Mr. Gregg: I have no further questions.

Mr. Cramer: I have nothing further, Your Honor.

The Court: You may step down, please.

(Witness excused.)

Mr. Cramer: I would like to call Mr. Edward Nabb as the next witness, please.

Thereupon—

Edward H. Nabb

called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cramer:

Q. Please state your name. A. Edward H. Nabb, N-a-b-b.

Q. And where do you live? A. Cambridge, Maryland.

Q. What is your occupation? A. I am an attorney.

Q. You are an attorney? A. Yes, sir.

Q. Do you have any experience in the use of
118 powerboats and speedboats? A. Yes, sir.

Q. Please state to Her Honor, speaking up as much as you can, Mr. Nabb, your experience and background in the field of speed and powerboats. A. Well, Your Honor, I have owned boats since I was quite young, about twelve years old. I have owned cruisers, sailboats like Chesapeake Bay skipjacks, inboard hydroplanes, outboard runabouts, inboard runabouts, Jersey skiffs, and I have operated most all types of cruising boats, power and sail, work boats, and I have constructed inboard hydroplanes, outboard runabouts, a Jersey skiff, I have installed the power in those various boats and I have always done my own engine repair work.

Q. Would you continue, please, in your experience with boating and your background generally? A. Shortly after the war, World War II, I started racing boats and after racing several seasons, I started to write about boats and engines and I have done that for the past eighteen years or so.

I write a regular series for Skipper magazine and a regular series for boat construction and maintenance, which are purely technical articles, how to do it
119 articles about boat engines.

I write several each year for Yachting magazine and I am in the middle of a rather long series for Popular Boating. I have had one book published on boat engines, marine engines, and another book has been published that is a collection of my technical articles.

Q. You are also experienced as a boat racing driver, are you not? A. Yes, sir, I raced for several seasons shortly after World War II. At that time I was fortunate enough to have a good boat and was the world record holder in my class, and am a member of the Marine Racing Hall of Fame.

Q. You are a world's record holder and a member of the Marine Racing Hall of Fame? A. Yes.

Q. On boat safety, safety use of boats, please tell the Judge your experience in that area. A. Well, of course, from years of experience, I have learned something of safety. But I have been particularly interested in it, in boat operating safety, for the past eight or ten years because I have headed up the Insurance Committee of the American Powerboat Association and we have a very strong safety committee with which I work very closely.

120 And I have been called upon at times to testify, as in this case, about boat safety or boat operations.

Q. Also, Mr. Nabb, you represent the United States of America in boating matters, can you tell us about that briefly, sir? A. Yes, sir. The American Powerboat Association is the leading organizer of powerboat contests in our country and for some five or six years, I have headed the International Affairs Committee of that organization. And there is a world governing body of harbor contests called the Union of International Motorboating and I am the American representative to that body. It has member countries, not individual members, but the United States is a member, Great Britain is a member, and I represent our country in that organization, I am the Western Hemisphere vice president.

Q. Have you tested boats professionally for boat manufacturers? A. I have done some professional testing of boats.

Q. Is this the speedboat type? A. Yes, sir, runabouts, cruisers, primarily to gather information for articles for magazines, and I have at times professionally tested boats for local boat manufacturers such as Dorsett when
121 they were located in Cambridge and I have assisted in testing of Bell-Craft, and each fall I am invited and attend a group meeting of various test people where we are given an opportunity to test all of next year's boats; for example, a few weeks ago, we were down in the Ozarks where we tested the 1966 models.

Q. Now, Mr. Nabb, are you familiar with the Chris-

Craft boat? A. Yes, sir, I am familiar with most of the Chris-Craft line.

Mr. Cramer: Your Honor, I respectfully submit that Mr. Nabb is qualified as an expert to testify in this case as to causation of a boating accident.

I have prepared, of course, the hypothetical question which is found on page 3 of our trial memorandum and that hypothetical question that I have, correlates the testimony on the preceding page from the depositions of the defendants. In the hypothetical question, I have in parentheses, after each sentence or phrase, referred the Court to the place in the depositions where this statement is taken from, in other words, the substance of the hypothetical question, and the substance of this entire hypothetical question comes from the testimony of Miss Stull and, more importantly, the testimony of the defendants given in their depositions.

The Court: Do you want to be heard?

Mr. Gregg: Yes, Your Honor. I gather at this time counsel is tendering this hypothetical question that is contained in his trial brief. I have two objections: One, it is elementary, of course, that information or facts contained in a deposition are not in evidence as that term is normally accepted. In order to have the information that is contained in a deposition in evidence, it is necessary that they be read in evidence or that they be offered in evidence in some fashion other than by merely referring to them in the course of a deposition.

The Court: I believe Mr. Cramer stated earlier that he expected to use certain portions of the deposition.

Mr. Gregg: Yes, ma'am. As far as I know, however, he has never offered that in evidence and at this point it is merely a deposition that is contained in the Court file and it is not evidentiary material before the Court.

Mr. Cramer: On that point, Your Honor, I refer the Court to the case of Pursche v. Atlas Scraper and Engineering Company, decided by the 9th Circuit Court of

Appeals, and the excerpt which concerns the use of defendant's depositions—

The Court: This isn't exactly that. I know what
123 the rule provides. If one introduces part, the other side may introduce other parts that they consider pertinent. But so far, while you have said that you intended to use certain excerpts, you haven't as yet introduced anything from the depositions.

Mr. Cramer: Yes, ma'am. Judge Matthews, I'd be glad to read those prior to his testimony, I'd be glad to read them into evidence.

The Court: Now, have you finished with your objection?

Mr. Gregg: I think that pretty well covers the first portion of it. The second portion is this, that generally speaking, of course, assuming that this gentleman is qualified to answer the specific question that might be asked of him, the rule is fairly well established that expert's opinions are only admissible where the fact or the matter intended to be proven is a matter beyond the comprehension of the jury or the Court. In other words, it has to be a specialized, specific field, and where the fact or the matter attempted to be elicited is a question of fact that can be drawn as well by the Court in this case as by the expert, then asking the expert to express an opinion on that is, to
use the old phrase, invading the province of the
124 Court or the jury.

Now, we have several cases in this jurisdiction that have continued to hold that expert's opinions are not admissible where the question is one the Court can understand and reach a conclusion on as well as the expert can. The most recent case that I have found is *Lewis v. Firestone*, 130 Atlantic 2d 317.

The Court: What was the question there?

Mr. Gregg: They had a fire marshal testify, Your Honor, as to the cause of the fire. As is usual in a case in the District, the fire department visit to a premises is followed up by a fire inspector and he, of course, has to file

a report as to what in his opinion the cause of that fire was. In this case the party called the fire inspector, qualified him as a man who frequently and regularly investigates fires, he has knowledge as to incendiaries and causes of fires and so forth, and he was asked the question.

The Court: What question was he asked?

Mr. Gregg: What was the cause of the fire. The Court held:

The rule is well established in this jurisdiction where the trier of the facts is just as competent to consider
125 and weigh the evidence as is an expert and is just as qualified to draw conclusions therefrom, it is improper to use opinion evidence. It is equally well settled that the facts upon which an expert's opinion is predicated must permit reasonably accurate conclusions as distinguished from guess work and conjecture. The opinion must be in terms of the probable and not the possible.

In this case the fire inspector found no tangible evidence of any kind bearing on the cause of the fire and the Court held that:

No skilled training or special knowledge obtained from experience was applied in arriving at his conclusion, indeed in light of the facts, anyone of ordinary training and intelligence would be equally capable of an opinion. To permit such speculative opinion was, in this instance, to invade the province of the trier of the facts.

The Court: Do you want to say anything?

Mr. Cramer: Yes, ma'am. I don't see anything that this evidence can do but help the Court. Certainly, if it contradicts what the Court knows in her own experience, she can disregard it.

126 I refer the Court, Your Honor, to an opinion of Judge Learned Hand on the use of an expert witness in the case of *Maibrunn v. Hamburg-American Line*, 77 Federal 2d 305.

The Court: What was the witness going to testify to in that case?

Mr. Cramer: He was going to testify that, well, briefly, it was a boating case and people were passengers in a boatline and there was a glass enclosure in which they were sitting, they were seated in a room and there was a storm and the storm broke the glass and injured them. The trial court held that the experts could not testify as to whether or not they should have had it metal rather than glass. The trial court held that that should be excluded because that was within the common knowledge of the trier of the facts. Judge Learned Hand, on page 305, said:

"Nor do we understand why so much of the plaintiff's proof should have been ruled out. True, it was in the form of expert opinion, and it is wise always to keep that well in hand; but the issues were beyond the personal acquaintance of the jurors; and they had to rely upon experts for any relevant information at all. It was the experts who alone could judge what weather required roping, and whether steel, not glass, was necessary . . ."

And Judge Learned Hand says:

"It is ordinarily more convenient to receive the testimony in the form of conclusions" from experts and leave the matter greatly to cross-examination as to its value.

And I submit, Your Honor, that the Court in this trial, which seeks only justice, can only be benefited by this man's testimony. Certainly, the Court doesn't even have to consider it, if Your Honor feels it is within her own province.

The Court: Well, I will rule that the witness is qualified as an expert on boats and the operation of boats and I will overrule the objection to the question.

Mr. Cramer: Thank you, Your Honor.

The Court: But I do think that you should put in the record whatever it is that you wish to include in your questions from the depositions.

Mr. Cramer: Yes, ma'am, I will do so instantly. Following my outline, Your Honor, in the trial memorandum, question point one, Long deposition, page 11, lines 1 through 15:

128 Question: What kind of boat was Mr. Engle operating?

Answer: I believe a 1953, eighteen foot, Chris-craft Capri.

Question: And that is a speedboat, isn't it?

Answer: That is a speedboat.

Question: Now, this boat of Mr. Engle's, did that have a new engine in it or approximately a new engine in it on the day of the accident?

Answer: It had a new engine.

Question: Do you know what that engine was?

Answer: It was a 327 cubic inch 230 horsepower engine.

Question: Did you say what kind of engine?

Answer: Crusader.

The next point, Your Honor, in Mr. Long's deposition, page 5, lines 21 through 25, and this is for the purpose of describing defendant Long's boat:

Answer: You want the year and date of the boat?

Question: Yes, and describe the boat.

Referring now to Mr. Long's own boat:

Answer: A 1956 Century Coronado. It's a twenty foot speedboat powered with a 250 horsepower Crusader Marine engine.

129 No. 3 in Mr. Engle's deposition, page 19 lines 1 through 5, and the purpose of this is to show the positions of the two boats prior to the collision:

Question: Now, you stated that just before your boat veered to the right,—this is a question to Mr. Engle—you were approximately 100 feet to the left of Mr. Long's boat and approximately 50 feet—

Mr. Gregg: Your Honor, at this point I have another objection I feel I have to make. It is this. The plaintiff has already testified.

The Court: To what?

Mr. Gregg: As to her version of the accident. Counsel is now going to read a deposition of Mr. Long (sic), the co-defendant, as to his version of the accident which differs materially from that given by the plaintiff.

The Court: Now, he is entitled to put in what he wants to from this deposition, then you may put in what you want from it.

Mr. Gregg: Your Honor, I object insofar as my client is concerned to his offering in evidence contradictory information or contradictory testimony which is in direct contradiction to that testimony of his own client, because he is in effect impeaching his own client.

130 The Court: I overrule the objection.

Mr. Cramer: Thank you, Your Honor. As to the positions of the boats, on page 19 defendant Long said:

Question: Now, you stated that just before your boat veered to the right,—this is defendant Long, I mean Engle, I am sorry—you were approximately 100 feet to the left of Mr. Long's boat and approximately 50 feet forward of his boat, is that correct?

Answer: Yes.

No. 4, from Mr. Engle's deposition again, on page 15 thereof, line 15 to 17, and this is the speed of the boats. I might say in preface of this, Your Honor, Miss Stull testified she was not a good judge of speed, but here is what Mr. Engle says as to his own speed.

Mr. Carr: I object to that aside there. She did not testify she was not a judge of speed, it was distance, she was very affirmative they were going slow and she could even hang her feet in the water, if she wanted to.

The Court: Mr. Cramer, I think without any side remarks that you should just read what is in that deposition without trying to tie it in with the testimony of anybody else.

Mr. Cramer: I am very sorry, Your Honor, and I will continue to do that. Page 15, line 15 through 17,
131 question to Mr. Engle:

Question: Now, before your boat veered sharply to the right, approximately how fast were you going?

Answer: About thirty. Between thirty and thirty-five miles an hour.

Now, as to the conditions, visibility conditions on the date of the accident, Mr. Long's deposition, page 38, line 7 to 11:

Question: What was the visibility like?

Answer: Very good.

Question: I take it the day was clear, the sun was shining?

Answer: It was clear.

Question: Is that correct?

Answer: That's correct.

Next is Mr. Long's deposition again, page 37, lines 22 through 25, and page 38, lines 1 through 6:

Question: Mr. Long, you said it was a—the weather was good or nice. What was the wind condition on that particular day, if you remember?

Answer: Well, you had a small chop on top of the water, three or four inch chop, which would probably represent seven or nine mile an hour breeze.

132 Question: My next question was: What was the water conditions and you say it was a small chop on top of the water.

Answer: Small chop and there had been plenty of boats in the area.

No. 7, Mr. Long's deposition, page 29, lines 17 through 23:

Answer: The thing of it is the river is wide down there. A boat just a half a mile in front of you and you are just catching his wake and the river, as I said before, was full of boats between—It seemed like when we had the accident, when he hit me there was fifteen boats on the spot before people were even fished out of the water. It just seemed like they come from nowhere.

And again on the same subject, page 38, lines 5 and 6, in answer to what was the water conditions:

Answer: Small chop and there had been plenty of boats in the area.

Next, No. 8, is page 29, lines 12 through 16, the question

referring to Mr. Engle and Mr. Long, "And you were running on approximately parallel courses?" The answer by Mr. Long:

133 Answer: Yes, we were running in a straight line.

Question: Just before you noticed this Engle boat go out of control, had any other boat traffic passed the two of you?

Answer: Yes, a small outboard had passed.

Question: Had he run between the two of you? Then I have read the rest.

The last one is Long's deposition, page 25, line 17 through 25, I will start off with the question to Mr. Long:

Question: What was the first thing that you noticed or saw happen out of the ordinary, either on his boat or your boat that indicated to you that something had gone wrong?

Answer: Nothing happened on my boat. On his boat—The boat seemed—It jumped across a small—a wake. It might have been a foot high or it might have been smaller. And when the boat went across the wake it seemed to sort of—Well, what it sort of—It just seemed to go out of control in the back end when it hit this wake. Like it air borned. It hit the wake and it looked like the boat air borned out of the water for just a minute.

134 That is the basis of the hypothetical question, Your

Honor, and I ask that that be accepted in evidence.

The Court: All right.

Mr. Cramer: I will proceed to the question.

By Mr. Cramer:

Q. Mr. Nabb, please assume that two inboard speedboats were cruising south on the Potomac River, approximately opposite Fort Belvoir; that the boat on the left, looking south, was a 1953, eighteen foot Christ-Craft Capri, powered by a 230 horsepower Crusader Marine engine; that the boat on the right was a 1956, twenty foot Century Coronado, with a 250 horsepower Crusader Marine engine; that the Chris-Craft Capri had three persons seated in it,

including the operator; that the Century Coronado was occupied by seven persons; that the Chris-Craft Capri was leading the boat on the right by approximately fifty feet and was approximately 100 feet to the left of the Century Coronado; that both boats were cruising between 30 to 35 miles per hour; that it was daylight and the weather was clear; that there was a wind of approximately 7 miles per hour, which created a slight chop on the water; that there were approximately 15 other boats, including cabin cruisers, within the vicinity of one half mile of the two cruising boats; that a small outboard motorboat had
 135 just passed the two boats; that the Chris-Craft then jumped across a wake which was approximately one foot high; that the Chris-Craft Capri then appeared to become air borne or to go into the air; that after hitting the wake, the Chris-Craft Capri went out of control, made a sharp turn to the right, traversed the distance between it and the Century Coronado and collided with the Century Coronado; that the bow or front of the Chris-Craft Capri collided with the left side of the Century Coronado; that the Chris-Craft Capri sank immediately after the accident; and that the Century Coronado was damaged and its passengers were thrown into the water. Assuming these facts, Mr. Nabb, please tell Her Honor, in your professional opinion, what the cause of the accident was.

Mr. Carr: I have some objections, Your Honor, before he answers that. I think in synopsisizing the testimony that there were some errors made. They are as follows. He said there were approximately fifteen other boats, including cabin cruisers, within the vicinity of one half mile of the two cruising boats, and the testimony to support this particular fact, he read from Mr. Long's deposition on page 29, starting at line No. 17, where the answer was:

The thing of it is the river is wide down there. A
 boat just a half a mile in front of you and you are
 136 just catching his wake and the river, as I said before, was full of boats between—It seemed like when

we had the accident, when he hit me there was fifteen boats on the spot before people were even fished out of the water. It just seemed like they come from nowhere.

That answer does not sustain the position that there were fifteen boats in the area within a half mile of the two cruising boats. In the first place, he refers to: "A boat just a half a mile in front of you and you are just catching his wake" refers to no particular boat but to a situation. He is trying to illustrate, in effect, his answer. But to synopsize that and say there were fifteen boats in an area and a half mile away from these two boats is inaccurate.

Mr. Cramer: Miss Stull testified, Your Honor, there were about fifteen boats within a radius of two blocks of the two boats, Mr. Engle's and Mr. Long's boat prior to the time of the accident. Therefore, we base this question in large part upon Miss Stull's own testimony.

Mr. Carr: It was based before on the answer I read to you, actually, out of Mr. Long's deposition which does not support that position.

Now, the second point—

137 The Court: Wait just a minute, let me find it.

The reference in this question is to the testimony of Mr. Long—no, it also refers to Miss Stull's testimony in the deposition. What is this, page 38 of her testimony?

Mr. Cramer: No, Your Honor, it is her direct testimony, not in her deposition. It is what she testified to here this morning, Your Honor.

The Court: The reason I thought it was what she said in the deposition is that you have Long 29 and 38 and Stull.

Mr. Cramer: I meant Stull's testimony, I am sorry.

The Court: Well, I remember that she did say there were other boats in the area, but I don't know whether she referred to fifteen or not.

Mr. Cramer: Of course, working with the case, Your Honor, I remember, I do have an independent recollection about fifteen, her statement about fifteen, Your Honor.

The Court: What part of her testimony is that?

Mr. Cramer: This must have been about 11 or 11:15 in the morning, I would say it was halfway through when she was telling about how the accident happened and before she went into the injuries.

The Court: It was before her cross-examination, was it?

Mr. Cramer: Yes, ma'am, and it is before the
138 injury, itself.

The Court: Do you remember that part of her testimony?

Mr. Carr: Your Honor, I was looking at the Long deposition. I believe she did testify that there were ten to fifteen boats in the area, around the boats, around the entire area.

The Court: I believe I do remember, she said some were going one way and some were going another.

Mr. Carr: Yes, one of them passed her this way and some passed her going the other, that is true, Your Honor, that I do recollect. But I was confining this to Long's deposition. Including Stull's testimony of ten to fifteen boats around the entire area, I do not think it is that inaccurate.

But the second point that bothers me, it says here that a small outboard motorboat had just passed the two boats.

Mr. Cramer: Page 29, lines 12 to 16.

Mr. Carr: I am sorry, Your Honor. I thought he ran between the two boats, if he passed the two boats, I would not object to it.

And the last objection I have, it appears that the answer
139 that has been asked for is too all encompassing here, what was the cause of this accident? That is the purpose of the entire trial. Usually an expert is called to use his expertise, not to tell us we ought to go home and the case is all over. And I think that has to be very severely limited, Your Honor. You ask what specific knowledge this expert would have to guide you in arriving at the very thing that he has been asked, namely, what was the cause of the accident?

Mr. Gregg: I object also.

The Court: Yes. Well, there is no jury here. I think that I will let him give the cause, if he can. It is his opinion, that is all.

Mr. Gregg: Your Honor, I object on an additional ground, if the facts on which this question is predicated are facts that are taken out of context to a long deposition, that the facts are not clearly and cleanly and in context to their background and other information given to the witness. I submit that the question as propounded is unfair and improper.

The Court: Mr. Cramer, there is one thing about this question, it talks about the speed of these boats and nowhere in the question does it ever indicate that the speed of the Long boat had decreased a great deal and was no longer 30 to 35 miles an hour.

Mr. Cramer: Mr. Long testified in his deposition,
140 Your Honor, that the two boats were going along almost parallel and they were both doing between 30 and 35 miles per hour.

The Court: I was thinking about the testimony of the plaintiff. She said that, previous to this accident, the Long boat had slowed down.

Mr. Cramer: Your Honor, I know that she has testified to that. I believe, of course working on the case you have an opportunity of knowing what the expert is going to say before you call him, and I believe that most of this statement is going to refer to the Engle boat, in any event. As far as this is concerned, I respectfully submit that it belongs within the domain of cross-examination.

The Court: Very well, I will overrule the objection, the witness may answer the question. Do you remember the question or do you desire to have it read?

The Witness: I think I remember it, Your Honor. It is my opinion that this accident was caused by the boats traveling at a speed greater than was safe in relatively well-populated waters. Added to that was a factor that the leading boat—

The Court: That the what?

141 The Witness: The leading boat, the boat that was to the left and ahead, had apparently been repowered with a larger engine than that with which it came equipped.

The Court: The leading boat had a—

The Witness: A larger engine.

The Court: Which do you consider the leading boat?

The Witness: The boat to the left, the Engle boat (Sic) is the leading boat. And the secondary accident, in my opinion, was caused because the following boat, the Long boat, was in a dangerous position in comparison to the Engle boat.

By Mr. Cramer:

Q. What effect did the wake have upon this accident, the wake that Mr. Long testified in the deposition that Engle struck? A. From the wording of your hypothetical question, it is my opinion that the wake was one of the large contributing factors to the accident. Had the Engle boat slowed down and met the wake—

The Court: Had the Engle boat slowed down and what?

The Witness: And met this wake, which is nothing more than an artificially caused wave, it is my opinion that he would not have lost control of his boat.

By Mr. Cramer:

142 Q. Now, the weather conditions and the visibility have been described. The wake has been described as almost a foot high. In your experience in operating boats, how far away from the wake should it be observed by the boat operator? A. It is my opinion that a wake a foot high should be observed by the ordinary operator at least 100 yards before it reaches him, in such weather conditions.

Q. I take it from what you say, Mr. Nabb, that there are standard operating procedures for speedboat operators in

going across for meeting wakes? A. Yes, I think the answer to that would be yes.

Q. And these procedures for safely meeting and going across wakes, they were not applied here, I take it, is that correct?

Mr. Gregg: I object, Your Honor, this witness can't possibly know that, from this question.

The Court: The objection is sustained to the form of the question.

By Mr. Cramer:

Q. Now, do you know what the original power engine of this 1953 Chris-Craft Capri was?

The Court: Now, you have given him this hypothetical question, and you asked him if he knows. If you want to put a question to him you can ask him, if it is in the
143 evidence, to assume that it was so-and-so and then answer the question.

Mr. Cramer: This question about the placing of a higher engine in the boat is not something that is in evidence but it is something which the expert knows by familiarity with the boat and familiarity with the engine that was in there.

The Court: You mean that a particular boat has a certain engine, is that what you are saying?

Mr. Cramer: Yes, ma'am.

The Court: All right.

By Mr. Cramer:

Q. What type of engine comes equipped with this boat originally? A. Sir, I don't want to confuse Her Honor, but in your hypothetical question you asked me about a 1953 Chris-Craft Capri. The Chris-Craft Capri was first built in 1955 and it came equipped with either a 100 horsepower six-cylinder engine or a 131 horsepower six-cylinder engine.

Q. And according to the hypothetical case, at the time of the accident the motor in the Engle boat was a 230 horsepower Crusader Marine engine? A. Yes.

Q. And that is an increase of about 100 horsepower? A.

It could either be an increase of 130 horsepower or
144 100 horsepower.

Q. What, specifically, effect does that have in this type of case? A. The 230 horsepower Crusader is a heavier engine than the 100 horsepower Chris-Craft or the 131 horsepower Chris-Craft. Each of the Chris-Craft engines weighs about 700 pounds, and the Crusader engine weighs between 900 and 1,000 pounds. In the Capri line of boats, the engine is installed toward the transom, toward the back end of the boat, and the additional weight in the back end of the boat changes its handling characteristics.

The Court: Changes what?

The Witness: The handling characteristics of the boat, the driving, the control characteristics. And the increased horsepower, if used, very greatly changes the handling characteristics of the boat because it makes the boat capable of going faster than it was designed to go. Said another way, it would be something like putting a very large Cadillac engine in a very small Chevy II automobile, it makes a rather tricky arrangement to handle.

By Mr. Cramer:

Q. Then do you feel as a result of the changing of the engine that the Engle boat was a difficult one to
145 handle at that time? A. It would be my opinion that it would be difficult for me to handle a boat so equipped.

Q. Can you give us an estimation, your opinion, as to the effect of the boats in the area, there were other boats in the area, I am giving you a hypothetical, what effect did this have on standard operating procedures that a boat operator such as Mr. Engle and Mr. Long should follow? A. I guess the best answer is that it is the difference between driving your car alone on a country road and driving it on a busy freeway. You must expect the other driver to do things that you don't anticipate, and you certainly must

anticipate such things as wakes, as the normal rule of the water from traffic.

Q. Is it your opinion in these circumstances that Mr. Engle should have anticipated the wake as well as even seen the wake? A. According to your hypothetical question, any operator should have anticipated wakes coming from almost any direction in these well-populated waters.

Q. And taken precautions when he saw the wake, is that correct? A. That is true, sir.

146 Q. And, again, the wake is what caused, in your opinion, Mr. Engle's boat to go off its course, hitting the wake as he did, go off its course and go into Mr. Long's boat, is that correct? A. In my opinion, it was a very strong contributing factor.

Mr. Cramer: All right. Thank you very much.

The Court: Mr. Gregg.

Cross-Examination

By Mr. Gregg:

Q. Mr. Nabb, did I understand you to say that the 1953 Chris-Craft was first manufactured in 1955? A. No, sir. My remark was that the Capri was first used as a trade name by Chris-Craft in 1955. It is very likely that those boats, some of them, were built late in 1954.

Q. Now, before coming here to testify today, Mr. Nabb, can you tell me exactly what information was provided to you? A. Yes, sir.

Q. I don't want you to tell it all to me now, I just want you to say yes or no. A. Yes.

Q. I gather you were contacted by Mr. Cramer or
147 his associate? A. Yes, sir.

Q. And you were given certain information? A. Yes, sir.

Q. Was this information provided to you in writing or in person? A. The information was first provided to me in writing. Naturally, I have talked to Mr. Cramer and his associate.

Q. And did they tell you who they represented? A. Yes, sir.

Q. Did they tell you what their aim was in having an expert at this trial? A. Yes, sir.

Q. Did that have anything to do with the type of a decision that you were willing to reach or arrive at insofar as your testimony here today was concerned? A. (No response.)

Q. In other words, the interest of the party who was engaging you? A. Yes—that was not intended as an answer to the question, Miss Reporter. To answer your question, understanding that I am an attorney and know something of these things, Mr. Cramer and his associate in no way influenced my opinion on my answers to this question or any other. Naturally, if my information had not been favorable to his case, I wouldn't be here.

Q. They would not have called you? A. That is true.

Q. Do you know how many other experts were contacted?

Mr. Cramer: Your Honor, I am going to object because it leads to the inference that some other expert was contacted, and I just don't see where it is admissible or relevant at all.

The Court: I will sustain the objection as to what he knows about somebody else being contacted.

Mr. Gregg: Well, that was my question, does he know of any other experts, prospective witnesses, who were contacted either before he was or afterward?

The Court: I sustained the objection to the question.

By Mr. Gregg:

Q. Now, do you have with you the information which was provided to you in writing by counsel for the plaintiff?

A. It is in the courtroom, I do not have it with me.

Q. Where, in the courtroom is it? A. The depositions were handed to me.

149 Q. Then do I understand you to say that instead of merely reading those portions of the deposition

that were included in the hypothetical question, you had access to all of the information contained in all of the depositions that have been taken in conjunction with this case?

A. I don't know. I only saw two depositions, I don't know how many were taken.

Q. Were the two depositions that you saw, the depositions of the respective operators of these boats, Mr. Long and Mr. Engle? A. Yes, sir.

Q. So you knew everything that they had previously been asked and answered in conjunction with those depositions, before you expressed even a tentative opinion? A. I had the information in the depositions. I honestly can't answer whether any other information had been elicited from your client, I had those two depositions which I read.

Q. Now, did you pick out the portions of the deposition that you thought were pertinent or material to your answering the hypothetical question of the type that has been propounded to you by counsel? A. No, sir, I did not.

150 Q. Did you assist in the preparation of the hypothetical question? A. No, sir, I didn't. It was sent to me in the form of a letter and nothing was added after it was sent to me, so I don't think I assisted in its preparation, no, sir.

Q. Before the hypothetical question was sent to you, had you expressed your opinion with respect to the cause of this accident?

Mr. Cramer: Your Honor, I object on the ground of irrelevancy.

The Court: The question is, had he expressed his opinion before when?

Mr. Gregg: Before he received a copy of the hypothetical question. This is cross-examination, Your Honor.

The Court: I know it is cross-examination, but I don't see where that would be very helpful to the Court, unless the Court knew what had been said to him before, if anything.

All right, you can answer the question.

The Witness: Would you please read it to me, Miss Reporter?

(The question was read by the reporter as follows:)

151 "Before the hypothetical question was sent to you, had you expressed your opinion with respect to the cause of this accident?"

The Witness: I expressed an opinion as to what part speed had in the case.

By Mr. Gregg:

Q. Well, then, would you say then that speed of the two boats, as contained in the testimony of the parties in their depositions, was a material factor insofar as your opinion is concerned? A. Yes, sir.

Q. And therefore that if the speed of the boats were different than that contained in either the hypothetical question or in their deposition, your opinion might be otherwise? A. If the speed was substantially different, yes, sir, my opinion would be otherwise.

Q. Now, are you familiar personally with the Potomac River in the area near Marshall Hall? A. I will say familiar, but not intimately familiar.

Q. When you say that, do you mean to indicate that you have been in that area on the water on more than one occasion? A. Mr. Gregg, I was in that area twenty years ago when I was stationed at Fort Belvoir, but not since then.

152 Q. I see. So that you are not at all familiar personally with the conditions existing as of, say, August 1962? A. Only as to the width and the things that haven't changed.

The Court: You know, I told you that I was going to adjourn today at 3:15, but I hate to bring this witness back here.

Are you in Washington, anyway?

The Witness: No, Your Honor, I live in Cambridge, over on the Eastern Shore.

Mr. Gregg: That is only a couple hours' drive, Your Honor.

Mr. Cramer: It will have to be done, apparently, Your Honor.

The Court: Well, you be here on Monday at 10 o'clock.

(Court adjourned at 3:15 p.m., to resume on Monday, November 15, 1965, at 10 a.m.)

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Transcript of Proceedings, November 15, 1965

PROCEEDINGS

The Court: Mr. Cramer.

Mr. Cramer: Yes, Your Honor. I believe when we left off, Mr. Nabb was on the stand.

Thereupon—

Edward H. Nabb

resumed the stand and testified further as follows:

Cross-Examination (Resumed)

By Mr. Gregg:

Q. Mr. Nabb, I think that at the time we recessed I had been asking you questions dealing with your familiarity with the Potomac River in the area of Marshall Hall in 1962, and I think that you had told us that your last experience on the Potomac River was approximately twenty years ago. A. Right, sir.

Q. So that you, of course, were not familiar, personally familiar, with the number of boats that were on the river in the area of this accident or their respective locations with respect to the two boats that were involved in the collision?

A. That is true.

Q. Nor were you familiar with the speed of the other boats that were in the area? A. I have no knowledge of the immediate area at the time of the accident, that is true, sir.

156

Q. Now, assuming that other boats in the area were traveling at a rate of speed that was commensurate with the rate of speed of these two boats, would you still say that speed was a condition that was a causative factor to the happening of this accident? A. Yes, sir, I think that speed is one of the prime factors in our accident.

Q. We know that on highways vehicles move along at a set rate of speed. Assuming that all the boats in the area of these two boats were traveling at approximately the same rate of speed as these two boats, would you still say that that was a causative factor, the speed of the boats?

A. If all of the boats in the area were traveling at approximately 30 to 35 miles an hour, which is your hypothetical question, speed, I would certainly say that speed was a factor and I would say that it was a very dangerous situation. Maybe I should explain a step further in saying that quite often with planing, p-l-a-n-i-n-g, type hulls such as the two in question, they will produce much less wake at a relatively high speed, a cruising speed, than they will cause or create if they are going very slow and pushing the water off plane.

Q. Then in other words, instead of there being
157 merely two negligent operators, if all the other boats in the area were traveling at the same rate of speed, in the event there were fifteen other boats, there would be fifteen negligent operators? A. If there were fifteen operators in the relatively crowded area in your hypothetical question, all traveling at speeds of 30 to 35 miles an hour, I repeat you had a dangerous situation and in my opinion the other operators would be negligent, yes.

Q. Suppose, Mr. Nabb, that there were a string of boats going down river at the rate of speed of approximately 30 to 35 miles an hour, with boats ahead of these two boats and boats behind them, would it not be more dangerous for the two boats involved to be going at a slower rate of speed, being passed constantly, than it would be to be maintaining their relative positions with respect to the other boats in

the area? A. In my opinion, you would be better off maintaining your relative position.

Q. We have testimony here, included in the hypothetical question, that a small outboard motorboat had just passed the two boats. Can you conceive of that statement being somewhat ambiguous? A. In my opinion, the state-
158 ment is susceptible to two interpretations.

Q. What two interpretations are there? A. My interpretation was that the person testifying meant that the small outboard boat met the two boats in our case, did not actually pass, in my opinion. Ordinarily, when you say a boat passes you, you mean it overtakes you. The impression that I received was that this small outboard boat met our two boats.

Q. Now, the sentence contained in the hypothetical was that a small outboard motor had just passed the two boats. Now, assume for the purpose of the question that the small outboard had passed, meaning overtaken and gone ahead. Would that have any effect upon your ultimate conclusion with respect to the cause of this accident? A. It would not have any effect on my conclusion because the wake would still be the factor, produced by the small outboard boat, and a following wake is equally or more dangerous than an approaching wake.

Q. With respect to the wake that we are discussing; by a wake, of course, you mean— A. An artificially made wave.

Q. In this case, the wake that we are talking about, you assume for the purpose of the question to be approximately a foot high, do you not? A. My recollection of the hypothetical question was a wake one
159 foot high.

Q. Now, in order to answer the question, did you formulate in your own mind the direction in which the wake was moving or the direction or the angle at which it met the leading boat which was, of course, the boat owned by Mr. Engle? A. Sir, your question was, by the wording of the hypothetical question, is that true?

Q. Yes, sir. A. By the wording of the hypothetical question, I did not take into account anything except that the wake was being met.

Q. Now, of course, the angle at which a boat meets a wake is an important factor, is it not? A. It is indeed, sir.

Q. For example, if the wake is on an angle such as this, the effect upon the boat would be different than if the angle were at right angles to the front of the boat or at an angle such as this, is that not so? A. That is true, yes, sir.

Q. Did you, in order to answer the question, formulate any opinion as to the angle of this wake? A.

From the hypothetical question, my own conclusion was that the wake was met rather than followed; in other words, the wake was met either bow on or quarter on, which means meeting it off to the right front or left front.

Q. Was it your opinion that the wake was a large contributing factor in the happening of the accident? A. Yes, it was a relatively large contributing factor, yes, sir.

Q. Wakes, of course, can be started up by a boat suddenly speeding up in the water, can they not? A. By a boat in any way changing its—well, by decelerating or accelerating or changing its pace.

Q. In other words, a boat over in this area could have been moving very slowly and then all of a sudden speeded up and the wake would have started approximately in this area, would it not have, if that had been the case? A. Yes, sir, in an area such as the Potomac, near Dove Creek and Gunston Cove, as I recall it is about a mile wide and a wake can follow for very nearly the width of that river, I would suspect.

Q. In other words, assuming what I have just said, that a boat in the relative area of these two boats started up suddenly creating a wake, under those circumstances
161 the operator of a boat who was meeting it would never even be in view for 100 feet, much less be able to be seen, isn't that so? A. If I understand your question, it is possible to have a wake created ahead of you less than

100 feet, and of course if it was created less than 100 feet, or 100 yards, which was my testimony, you of course could not see it.

Q. And it is possible for a wake to be created almost immediately in the path of the boat by another boat in the area? A. Yes.

Q. And of course, if that were the case, the operator would not have an opportunity to see it or to take this evasive action that you referred to? A. Yes, sir, I think that is a matter of fact.

Q. Then would it be your testimony that if there were no wake, that there would not have been an accident? A. Mr. Gregg, I hardly know how to answer your question. If you are referring me back to the hypothetical question—

Q. I am referring to the context of the hypothetical question and I am removing from that question the fact that there was no wake, instead of assuming that there was a wake, assume that there was none. A. It is almost impossible to answer, but it would be my opinion that if
162 the E boat, the Engle boat, had not struck a wake or been affected by a wake, when these two boats were in their relative locations, the boat would not have spun out and hit the following boat, the Long boat. I think the wake certainly was a factor, the wake and the speed were the two factors.

Q. If you eliminate the wake, then you merely have a negligent speeding condition existing in a vacuum, wouldn't that be so? A. I think with the elimination of the wake, the only other point to consider would be speed in operating, yes, sir.

The Court: Speed in what?

The Witness: The operation of the boat.

By Mr. Gregg:

Q. It would follow, then, if there had been no wake, there would have been no accident? A. In my opinion, had there been no wake at the moment that these two boats were in

their relative positions, there would have been no accident to Miss Stull.

Maybe in order to clarify that a little for the Judge, I could further say that had the boats not been in their relative positions at the time the Engle boat went out of control, there would have been no injury to Miss Stull anyhow, because the Engle boat would have capsized
163 or spun around and not come in contact with the Long boat.

Q. If the Long boat had not been in its relative position prior to the accident? A. Right.

Q. In that respect, when two boats are traveling along more or less in formation, which boat adjusts its speed or adjusts the distance factor? A. Well, all the rules that I know, Mr. Gregg, say that the overtaking boat is the boat that is burdened with the extra care, and the hypothetical question doesn't help me as to who is the overtaking boat.

Q. Now, didn't you assume in connection with the question that the two boats were traveling along at a constant speed of approximately 30 to 35 miles an hour, with the Engle boat leading by approximately 50 feet and being approximately 100 feet to the left? A. Yes, sir.

Q. So that there would be no overtaking situation in conjunction with that set of facts, it would be two boats moving along like two airplanes in a formation? A. Right, sir.

Q. Can you answer my question, then, as to which boat of the two has the responsibility of maintaining the
164 respective distances? A. I can only assume that the following boat, the boat that is behind, could conceivably be the overtaking boat, surely the boat in front could not be the overtaking boat. If the boat in front, the lead boat, were to suddenly decelerate, slow down, it would then certainly be the responsibility of the following boat to adjust its course. That's as close as I can come to answering your question, Mr. Gregg.

Q. All right. In other words, there is nothing in your

experience that gives us a guide similar, for example, to that used by airplane pilots by flying in formation? A. I am not sure that I understand what you mean by airplane pilots flying in formation. It was my impression that the lead pilot, the lead airplane, was the guide and you do whatever he did.

Q. Is there a similar doctrine in your experience dealing with boats? A. No, sir. Again, I don't want to be repeating, the overtaking boat is the only guide that I can give you. If it will help any, getting away from the hypothetical question for a moment—

Q. I would rather not, sir. A. All right, sir.

165 Q. Is there any reason why one boat, or when two boats are going to a common area, why one boat would follow the other rather than just side by side? A. I can give you no rule of law but there are a number of local conditions that could exist. For example, if you have observed cruisers, relatively slow cruising boats, they are 15 to 20 mile an hour boats, you will quite often see them strung out in a perfectly straight line, so that the following boats will travel in a less disturbed sea. They will travel in the smooth wake of the lead boat. You will find with racing boats or very fast boats, they will generally go on a straight line, one will not get caught behind the other or into the wake of the other.

I have plotted the condition that existed according to the hypothetical question and the only help I can give you, sir, is that you would stay, normally stay ahead of the wake of the leading boat, there is a wake that peels out at about 30 to 40 degrees from the lead boat and you would certainly try to stay above that because it would be a dangerous situation if you didn't.

Q. In other words, the trailing boat would maintain a distance that would keep it ahead of the wake of the
166 leading boat? A. Right, sir.

Q. Now, at a speed of approximately 30 to 35 miles per hour, how fast would those boats be traveling

in terms of feet per second? A. I can't answer that without a chart. I can't attempt to answer that.

Mr. Gregg: I have no further questions.

Cross-Examination

By Mr. Carr:

Q. Mr. Nabb, my questioning is not going to be confined completely to the context of the hypothetical, but will deal with your field of expertise in boats, if I may. However, am I right in saying that your answer, though, was definitely confined to the facts that were given to you in the hypothetical question? A. My facts about the happening, yes. Now, obviously, Mr. Gregg led me into other lines of questioning.

Q. I realize that, I mean your original answer? A. Yes, sir.

Q. All right, Let me deal a moment with the boats, if I may.

Mr. Carr: Your Honor, with your permission, I'd like to turn this blackboard around.

167 The Court: Very well, you may do so.

By Mr. Carr:

Q. Mr. Nabb, I have attempted to place these boats on a half inch scale, approximately where they were and I'd like to verify this for you. This is a 20 foot, 1956 Century Coronado. It is a 20 foot long boat and I have made it 10 inches long.

This is an 18 foot Chris-Craft, probably the Riviera series rather than Capri series which as you indicated didn't exist at that time, an 18 foot boat and I have made it 9 inches long. I have given them beams of about 7 feet, they probably average 7 foot some inches, and that is a little less than 7 feet, actually.

Assuming that my ruler is correct, would those be the approximate scale size of those boats? Do you understand

the scale? A. Yes, I understand, I have done the same work that you have done.

Q. Also, the testimony that was presented at least on the hypothetical is that they were 100 feet apart, so I have placed them 50 inches apart here. And I have placed them, the boat over here, 50 foot ahead, so this is roughly the diagram of the position prior to the accident on 168 August 12th. Do you understand this situation?

A. Yes, sir.

Q. You understand the scale? A. Yes, sir.

Q. Now, let me talk about this boat for a moment, This is a 1956 Century Coronado, are you familiar with that boat? A. Yes, sir.

Q. What was the stock engine in that boat, the one that came with it? A. I think you could get a variation of engines, but the engine we generally used was a 327 cubic inch Chevrolet, reworked by Cal-Connell, the Crusader line. It was essentially the same engine that was in the Chris-Craft.

Q. Assuming and I am going to change the facts now and we will have evidence later to support my assumption: Assuming that it was a Cadillac base, Crusader Marine engine that came stock in this boat, does that sound right to you? A. Yes.

Q. Two hundred fifty horsepower? A. Two fifty, yes.

Q. Put in by the maker of the boat? A. By Century, yes, sir.

Q. Now, assuming also that this boat was operating approximately half power or turning up revolutions of 2800 to 3300 revolutions per minute, would this be the maximum speed for that boat? A. That engine, with a proper propeller in that boat, should turn 4,000 to 4400.

Q. In fact, 4400 is probably maximum? A. Yes.

Q. So assuming that there is testimony or will be testimony that the revolutions were 2800 to 3300, it was not going anywhere near its maximum speed, is that correct?

A. No, the Century is a very fast boat, it is one of our fastest stock boats.

Q. You mentioned cruising speed. I presume that is a personal thing with the individual operator, is it not? A. Very much like driving an automobile, yes, sir.

Q. Are these planing type boats? A. Yes, sir.

Q. In a planing type boat, when they go into a planing position, would they be at cruising speed at that time? A. Ordinarily they would plane at much less than the usual cruising speed. It is my estimate, my opinion, that the Century would probably plane out at about 20 miles an hour and it is very likely that you could ease back on the 170 throttle and remain on the plane at less than 18.

Q. I mentioned cruising speed before and you mentioned it also in your testimony with Mr. Gregg, does cruising speed depend on the boat, the experience of the operator, the condition of the weather, or a combination of all of these factors? A. All of the factors, including the weight that is carried on the boat.

Q. The wake that it is giving out? A. Weight, w-e-i-g-h-t.

Q. Then this weight depends on the hull weight, the weight of the engine, the number of passengers, any other equipment they may have aboard, isn't that right? A. Yes.

Q. Now, assuming there is testimony that at 2800 to 3300 RPM's the Century Coronado was at cruising speed, would you contest that statement? A. I have no reason to contest it. If you are asking me, will the Century Coronado—

Q. No, I am asking you would that be cruising speed for the Century Coronado? A. It could be cruising speed for some operators, yes, sir.

171 Q. And the experience of the operator would be important there, too, would it not? A. The experience of the operator would be important in the running of the boat, yes, sir.

Q. Now, assuming this position here that I have on the board of 100 foot apart and the one boat being 50 feet

ahead, on that situation alone, isolated, what rule of the road was being violated by the Engle boat? A. I don't know of any rule of the road that would be violated by that sort of running.

Q. What rule of the road would be violated by the Long boat? A. I know of no rule of the road that would be violated by either of those operators.

Q. Now, when you were asked in the hypothetical, the facts that you were given in the hypothetical, and you made the conclusion that first they were traveling too fast, and secondly, that the Long boat was in a dangerous position, what other factors were you taking into consideration to arrive at that, other than their positions that I have here? Were you taking the fact that there were other boats in the area? A. I was taking into consideration, of course, all the points of the hypothetical question, the relatively well-populated waters, the wake that was reached, the fact
172 that a boat had passed in the immediate future or immediate past.

Q. Did you connect the wake of the passing boat with the wake that allegedly caused this accident? A. I assumed that the passing boat, the meeting boat, could have created that wake, yes.

Q. This was not contained in the hypothetical question, was it? A. The hypothetical question said a small outboard had just passed.

Q. And you assumed it was the wake of that small outboard that may have caused this accident, is that right? A. Yes.

Q. However, you say that the population, the number of boats in the area, you considered to be important. Did you assume that these boats were directly in front of these cruising motorboats? A. No, sir, I assumed that they must be all about, if there were that many boats in the area.

Q. Let's assume that the two operators here had a clear shot, clear water ahead of them, there may be 15 boats in the area but it is over a half mile, they may have been

on the side of these boats, assuming the two operators had a clear shot and there was no boat directly in front of them, would that change your thinking at all as far as their speed was concerned? A. We are now removing the wake as Mr. Gregg—

Q. I am not removing the wake, leave the wake there, there are always wakes in the river, we both know that, leave this wake there, any wake, a number of wakes, but I mean assuming now that there are no other boats ahead of them and the two operators had clear water in front of them, now how about their speed, is that still a factor? A. Speed is still a factor, it certainly is relieved by the elimination of any boats in the immediate front.

Q. Well, speed obviously is always a factor, is it not? In other words, if they were going 5 miles per hour, no doubt there would not have been an accident? A. That is right.

Q. Assuming there were no boats in front of them, that does relieve this idea of high speed, does it not? A. It certainly relieves or removes some of the need for caution and care.

Q. You have indicated that that boat was in a dangerous position to this boat, and you also testified before that you had about a 30 degree wake in back of the boat, that is probably even exaggerated, it is probably a little thinner than that, I imagine, so obviously he was not traveling so that he would strike this wake, he was in front of that wake, isn't that right? A. It is my opinion from plotting these boats that putting a boat 50 feet back, 100 feet to the side, he would be removed from the wake area of the leading boat, yes, sir.

Q. In other words, in a position where he should have been ahead of the wake or else back of the boat, behind the wake, isn't that true? A. Either behind or ahead of the wake, yes, sir.

Q. Now, you said this boat was in a dangerous position. Is it in a dangerous position because it is too close to that

boat? Now, don't look at the accident first and work your way backwards, let's start here and look up to the accident.

A. All right, sir.

Q. Draw upon your own skill on the river in the same situation, placed here before an accident occurred, traveling at this distance apart, would a reasonable operator have considered himself to be in a dangerous position in relation to that boat? A. In my opinion, the experienced operator would probably have felt that he was in a relatively safe position that far away.

Q. Thank you. Let's discuss the Chris-Craft for a moment, if I may, the 1953 Chris-Craft. Assuming that it is a 1953 Chris-Craft, that it had a 120 horsepower engine in it originally, which I believe you said it could have had and let's assume that it has, isn't it true that this was no doubt the stock engine, the engine that came in the boat originally? A. Chris-Craft uses two engines, one, 100 horsepower and one, 131 and you are in the right area, yes, sir.

Q. So no doubt this was a stock engine? A. Yes.

Q. What would have been the maximum speed of that boat with this stock engine in it, prior to any conversion?

A. Here again, this is an opinion answer. These boats are advertised at about 35 to 38 miles per hour which is a very, very exaggerated advertising. It is my opinion that this boat, being several years old, having a stock engine of 100 or 131 horsepower, would have a speed of about 30 to 33 miles per hour.

Q. About the same zone they were in when this accident occurred? A. Yes, sir.

Q. Now, assuming you were updating your 1953, not Capri but Riviera, I think that was the name of it at that time, isn't it true that Chris-Craft no longer puts 120

176 or 131 horsepower engine in the boat, but they now put a 327 cubic inch, 185 plus, up to as high as 210 horsepower in their boats, the same size? A. No, sir. They do put out the 185 horsepower engine which is the

next size smaller General Motors or Chevrolet engine, the stock engine that you would have in a Chevrolet automobile, 283 cubic inches.

Q. That's right. 283 or 327? A. 283 is the stock engine. 327 would be the truck engine that is used in some models.

Q. But it is a substantially different engine, though, than the straight six engine that was used back in 1953? A. Oh, yes.

Q. The engine that came with the Chris-Craft, in effect is obsolete today in boating? A. Well, they are still being built, they are not sold like they were in 1953. They are still available, they are still a very fine piece of equipment.

Q. In other words, assuming that an owner of a motorboat was updating his boat, which I assume is done in boats frequently, it would not be unlikely for him to put in a 283 or a 327 cubic inch Chevrolet based engine, isn't that correct? A. Here again, this is an opinion answer and
177 in my opinion it is not the usual thing to increase horsepower that much with a stock hull.

Q. Although the current Chris-Crafts do have horsepower of that degree, do they not? A. Yes, sir, that is true but the boat is wider and the very newest ski boat, for example, it has non-trip chines which makes the boat safer.

Mr. Carr: I wish you would mark this Defendant Long's exhibit for identification.

The Clerk: Defendant Long's No. 1 for identification.

(Chris-Craft brochure was marked Defendant Long's Exhibit No. 1 for identification.)

By Mr. Carr:

Q. Mr. Nabb, I show you what appears to be a Chris-Craft brochure for 1965 boats, which has been marked Defendant Long's Exhibit No. 1 for identification and ask you if you are familiar with this particular publication? A. Yes, sir, I have seen it, it is the Cavalier line.

Q. I direct your attention to their 18 foot custom, their 18 foot boat. This is the Chris-Craft of the day, is that not true? A. Yes, sir.

Q. In other words, assuming we had a 1953 book here, I assume we'd find the Riviera so listed in the position
178 of the 18 foot boat? A. Yes, sir.

Q. I notice here that they indicate in their 18 foot custom speeds up to 44 miles an hour? A. Yes, sir.

Q. In other words, that is the advertised speed on this particular boat, isn't that true? A. Yes, sir, 185 with 210 horsepower.

Q. Up to 44 miles per hour? A. Yes, sir.

Q. Approximately 10 miles or 11 miles an hour faster than the Engle boat was traveling on this particular day, isn't that correct, although it is the same size boat? A. I don't want to confuse you, sir, but that is a smaller boat that you have there, it's a shorter boat, it's 18 feet long, the boats back in the late fifties were 19 feet, approximately 19 feet long.

Q. I believe the boat we are dealing with, at least in the hypothetical that we have been given, is an 18 foot Chris-Craft? A. Yes.

Q. Possibly it was a 19 foot, I don't know. A. It was, and you will find that the modern Chris-Craft is
179 a wider boat.

Mr. Carr: Your Honor, I would like to offer this in evidence, if I may.

Mr. Cramer: I have no objection.

The Court: Admitted.

The Clerk: Defendant Long's Exhibit No. 1 received.

(Defendant Long's Exhibit No. 1 was received in evidence.)

By Mr. Carr:

Q. Mr. Nabb, assuming that there was no tachometer on the Engle boat—

The Court: No what?

Mr. Carr: Tachometer, I think that's an instrument that rates revolutions per minute on the motor. Am I right?

The Witness: Yes.

By Mr. Carr:

Q. And the only way that he could determine the speed of his boat was by how far his throttle was pulled back, and assuming his throttle was pulled back approximately one-half of the way, would it be right to say that he was not going the maximum speed that that boat would actually travel? And assuming also that he was riding parallel and approximately in relatively the same position with a boat that was traveling at 2800 to 3300 revolutions per minute,

180 can we say that the Engle boat was not traveling maximum speed? A. No, sir, not knowing the boat itself, I couldn't answer that, because like an automobile or any other piece of mechanical equipment, the stroke, the throw of the accelerator or throttle is not relative in all cars, you can adjust one automobile or one boat so that you might have full throttle at half of the throttle movement, you might have full power, and another boat could be adjusted so that even with the throttle wide open you wouldn't be getting full power, so it is really beyond my ability to answer, not knowing the boat.

Q. Well, we have also been told and you have been told it had a 327 cubic inch engine in it? A. Yes, sir.

Q. And I believe it was your testimony that this boat was overpowered because of this. However, in light of the fact that the other boat was traveling 2800 to 3300 revolutions per minute and you testified it was not maximum speed for that boat, in fact it could go as high as 4400 revolutions per minute, isn't it safe to assume that the Engle boat also was not traveling maximum speed with this particular overpowered engine in it, as you said? A. I could probably best answer your question by saying, in my
181 opinion, the speed of the two boats at absolute top power would be comparable; while the Century is a faster boat in its stock condition, it is likely that the little Chris-Craft with the big engine could match its speed, all things being equal, so it follows that if the

Century were not operating at top speed, the Cris-Craft should not have been operating at top speed.

Q. I believe you also testified that the size of the engine can affect the handling characteristics of the boat, and I believe you stressed this particularly in the fact that there was a weight difference, that one engine weighed 600-some pounds and the other weighed 800-some pounds, is that correct? A. The weight, of course, is more critical than size, yes, sir.

Q. And size wise, the 327 cubic inches might be smaller in length? A. It might have been shorter, yes, sir.

Q. Isn't it also true that the handling characteristics can be changed by other factors as well, namely, by the number of passengers, their position in the boat, whether they are in the back of the boat, the front of the boat, or on one side of the boat, that also can affect handling characteristics? A. Any change of balance on a small boat will affect its handling characteristics, that is true.

182 Q. So it is not just the size of the motor alone? A. No, sir.

Q. In other words, one 200 pound man has the same effect as an extra 200 pound weight on the boat, in the motor? A. Here again, this is on opinion answer, but most any man who has had experience with boats will tell you that live weight and dead weight do have a little difference. In theory, yes, you put a 200 pound man in a boat, it should make the same difference as a 200 pound increase in weight in the engine but for some reason it doesn't exactly do it.

Q. Isn't it true also that the live weight, in the very fact it is mobile, can be more dangerous to an operator than the dead weight which he already knows about? A. Yes, improperly used, that is true.

Q. One other question. Apparently something occurred to the Engle boat. Now, it has been assumed today that he struck a wake, because that is what your hypothetical told you. A. Yes, sir.

Q. But isn't it also true that this boat could have spun out for other reasons, that it could have hit a submerged

log, that a twig or a branch could have caught in the propeller and changed the whole turbulence situation back in the rear part of this boat, and that a wake is not the only thing that could cause this boat to spin out? A.

183 Yes, sir, the boat could spin out, which is a technical term in boat handling, from just plain pilot error or it could have spun out for any of the reasons you suggested; yes, sir.

Q. Tell me some other reasons, I am sure I didn't suggest them all. What are some other reasons that a boat can spin out for? A. The changing of balance, by putting a slightly heavier engine well back aft will probably cause most boats to porpoise, which means to move up and down in such a fashion.

Q. Say a passenger stepped to the back, wouldn't the same effect have occurred? A. We are still on the same boating hypothetical, are we, sir?

Q. Sure. A. There is only one cockpit in this boat. I would suppose, I don't think that a passenger could move far enough forward and backward to make a great deal of change in the attitude of the boat.

Q. Could debris in the water cause it to spin out? A. Oh, yes.

Q. Is there anything else besides motor, passengers
184 and debris that could cause this boat to spin out?

A. Many things, failure of steering.

Q. You could have had a mechanical failure in the boat, is that right? A. Any kind of mechanical failure, suddenly losing a propeller, suddenly having power transmission failure—a number of things could cause a boat to go out.

The Court: You said something a moment ago about pilot error. How would pilot error have affected the way this boat acted, the Engle boat?

The Witness: Well, if we may get back to the fact that there may have been a wake, pilot error of not correcting to meet the wake in a proper direction could have caused

it. The pilot turning the boat too quickly, that is the sort of thing I mean by pilot error, decelerating quickly and turning at the same time is a common pilot error that will cause a boat to go out of control. The words "spinning out," Your Honor, means that the boat sticks its bow down and the bow becomes the pivot rather than the rudder becoming the pivot, it is a common occurrence with fast boats, particularly racing boats.

Mr. Carr: Your Honor, would you grant me an indulgence for a minute, please?

185 The Court: Certainly.

(Mr. Carr conferred with Mr. Gregg.)

Mr. Carr: Your Honor, I have nothing further at this time.

Mr. Cramer: Redirect examination, may it please Your Honor.

The Court: Yes.

Redirect Examination

By Mr. Cramer:

Q. Mr. Nabb, I believe that you and Mr. Carr stated and agreed that other boats, I believe the statement was 15 boats in this area, would cause wakes even though these other boats were not directly in front of the two boats in question, is that correct? A. Yes, sir, a wake can follow for many miles.

Q. So therefore, even though there were perhaps no other boats in front, there could be wakes in this area and probably would be wakes in this area, is that correct? A. That is a reasonable assumption, yes, sir.

Q. Should an operator of a boat, seeing other boats in the area, expect wakes? A. Yes, sir.

Q. Now, if a boat were passing the two in the
186 sense that they were coming in the opposite direction—if I may turn this board around, please—if a boat was coming in this direction, the opposite direction

from which they were going, should Mr. Engle have been prepared for a wake? A. The operator of both boats should have been prepared for a wake, yes, sir.

Q. Now, if a boat came in the same direction they were going, how much difference or how much time generally, after the boat passed in the same direction, would they have an opportunity to see this boat's wake? A. The wake of most boats travels at about 30 to 40 degrees angle from the bow of the boat, so it depends upon how far to either side the boat is, the overtaking boat; for example, if a boat would pass you only 5 feet away, the wake would overtake you almost immediately, you would run over the wake; if the boat were 100 yards away, I would estimate that he could possibly be 200 yards in front of you before this 45 degree angle wake would hit.

Q. Now, in your experience, Mr. Nabb, an operator of a boat can easily hear another boat approaching? A. Not in a powerboat, no, sir.

Q. All right. Now, you have answered questions concerning the advertised speed of the boats, how fast
187 they can go, does the advertised speed necessarily mean that that is the safe speed of the boat? A. No, sir. Generally, advertised speed is arrived at by taking all of the weight out of the boat and putting a light driver in with a light fuel load and having absolutely perfect conditions and running the boat and saying this boat will do 35 to 38 miles an hour; when, in practice, should you load the boat and put the proper equipment on it, the speed would be substantially reduced.

There is generally what is commonly called a design speed, all boats have it, beyond which they just should not be driven regardless of whether it is the fastest boat on earth, whether it goes 200 miles an hour, there are certain speeds at which that boat is hard to control.

Q. Can you draw a correlation between a boat and a car, a car being advertised as doing a speed of 120 miles an hour, an ordinary passenger car, a safe speed would

not always be 120, of course, would it? A. Oh, no, it would be half of that.

Q. And the same, of course, applies to boats, does it not?

A. Yes, sir.

Mr. Cramer: I would like, Your Honor, to ask
188 another hypothetical, because the question raises something brought up by Mr. Nabb, it concerns the experience of the operator and I would like to refer the Court on this part to page 12 of Defendant Thomas Long's deposition.

The Court: Whose deposition?

Mr. Cramer: Defendant Thomas Long. It actually starts, Your Honor, on page 11, line 23 at the end of page 11.

The Court: Do you have the jacket down there?

Will you go and see if you can get this jacket (speaking to the Marshal).

Mr. Cramer: Beginning on page 11, Your Honor, line 23.

The Court: Is this Mr. Engle's deposition?

Mr. Cramer: No, Your Honor, it is Defendant Long's deposition.

The Court: All right.

Mr. Cramer: This refers to the fact in Mr. Nabb's testimony that a new engine had been put into the boat prior to the accident. The answer starts on line 23, page 11, this is Mr. Long who is saying:

A. We put the engine in the boat—Long's boat—approximately in June of '62. It may have been sooner.

Q. And then after you put the engine in the boat,
189 how long was it before the boat was put in the water?

This is page 12.

A. It was in and out of the water. We had put it in to swell the bottom up and pull it back out to do some more painting on it.

Q. How many hours would you say that boat had been operated with that Crusader Engine in it?

A. Approximately ten hours.

Q. How many hours would you say that boat had been operated?

A. Approximately ten hours. May have been less. I took the boat out and tried it out to make sure it was running properly and we changed a few propellers on it to see what performance we could get out of the engine.

Q. Now, of the ten hours that boat had been operated with this Crusader Engine in it before the day of the accident, can you tell me, as well as you can remember, how much of that ten hours you had been in the boat?

And Mr. Long answers:

A. Probably all of—Probably eight hours.

Q. And during that eight hours was Mr. Engle in 190 the boat with you or was he in the boat part of the time?

A. He was in the boat, I believe—I believe he went with us for a couple of what we call a shake down run.

Q. And the shake down run would be to try the engine out to see how it was operating? To see what adjustments you wanted to make?

A. That's right.

By Mr. Cramer:

Q. Now, Mr. Nabb, bearing this question in mind, I would like to ask you this: Is eight or ten hours operating experience with a new engine, is that considered a substantial amount of experience for a boat operator with a new engine? A. I think the answer would have to be no. Maybe I can help you by telling you that most of the trade manuals and magazines figure that the average boat owner, not the real enthusiast and not the man who is a casual user, but the average boat owner uses a boat between 60 and 70 hours a year, so this is a new engine and a new operator, really.

Q. Therefore, would that lead you to the conclusion that Mr. Engle was a relatively inexperienced operator with this new engine at the time of the accident? A. That Mr. Engle?

191 Q. That Mr. Engle was relatively inexperienced with this engine and this boat? A. I understood the reading to say it was Mr. Long who used the boat for ten hours.

Q. Well, let's say that Mr. Long said in effect that Mr. Engle was with him. He didn't say that Mr. Engle operated the boat all those hours, but assuming that Mr. Engle had at least ten hours' experience operating, would he be considered experienced with that boat and that new engine? A. Mr. Cramer, it would have a great deal to do with his previous training. If a man was a well-established boat operator and he had used, he had driven the boat for ten hours, he should be relatively familiar with it. Had he just been riding in the boat and observing it for ten hours, no, he would not, probably not be familiar with its habits.

Q. Does familiarity with the habits of the boat and the handling of the boat help in a situation such as the one involved in this accident? A. Oh, yes, every boat handles differently and even the most experienced race drivers require ten or twelve hours before they really are free with a boat, the most experienced race driver would require that length of time before he would safely venture on a race course.

192 Q. What effect would experience or lack thereof have upon the defendant Mr. Engle in the handling of this boat under the situation? A. Under the original hypothetical question?

Q. Yes, sir. A. I think an experienced driver, in my opinion, would have anticipated wakes in a crowded area and would have reduced his speed or adjusted the direction of his boat to meet those wakes.

Mr. Cramer: I have no further questions.

Recross-Examination

By Mr. Carr:

Q. You were asked a couple of questions by Mr. Cramer concerning advertised speed on boats. Isn't it also true that advertised horsepower on engines has to be judged in the same manner? A. (No response.)

Q. Depending on the size of the wheel, the particular boat involved— A. Yes, sir. Horsepower in advertising is a very, very confused situation in our country. There is no one governing body that will tell you how many horsepower your engine has and that you may advertise that horse power.

193 Q. So when we are speaking here of an engine with advertised horse power of 230 horsepower, that is not very accurate, is it? A. No, sir, that same engine on an automobile would probably be advertised at 320 horsepower.

Q. And on a particular boat using a particular size propeller, it may be dropped much less than 230 horsepower in actual operation, isn't that also true? A. Yes, sir. The engine would have to turn at least 4,000 revolutions to be getting substantially all of its power.

Q. Mr. Cramer made rather an odorous comparison between an automobile with an advertised mile per hour of 120 miles per hour and a boat with an advertised speed of say 41 miles per hour. I ask you to examine that for a moment. The comparison we are asked to make is that if you are driving your boat at 41 miles per hour on the waterway that that is the equivalent of driving a car 120 miles per hour on a highway. Is that correct? A. Are you asking me what his thoughts in asking the question were?

Q. I am asking you that and I think it is pretty obvious why the question was asked and I think we all understood it. Is that a good comparison between driving a car
194 120 miles per hour on a highway and driving a powerboat at 41 miles per hour on the waterway?

Q. Now, what is the nature of her duties? A. She is a steno-typist.

Q. You know that her left hand has been injured in an accident? A. Yes, sir.

Q. Keeping your voice up, Mr. Ward, I wish you would tell the Judge in your own words whether or not you notice anything unusual about Miss Stull's use of her hand and, if so, what is that? A. Well, Gene has, with the accident and the apparent limited use that she can have of her hand, Gene in typing, different from most people that you notice type, types with her thumb up in the air, the thumb on her left hand. She doesn't use that thumb for the
198 space bar or for anything like this. In her work, normal work, if she picks up a cup or a glass or anything with her left hand, you notice that she has a peculiar way of gipping it and it's usually towards the bottom, because if she tries to grasp anything with that left hand, she doesn't have pressure contact; if she squeezes harder with that hand, it seems to bother her quite a bit.

Q. As regards her working, have you seen anything unusual, seen her do anything different from other people that work for you? A. I suppose you mean in her typing?

Q. Yes, sir. A. Yes. Well, you know, the work we do in our office, a great amount of the typing is done with figures. I would say that in a normal document that we produce out of the office that 25 to 30% of it is dealing with figures. In doing this, it seems to be a strain on any of the girls and most typists that we have are not too anxious to do much typing of figures. All of them seem to be under a strain when they are typing figures. But with Gene, it is real apparent that after an hour or two hours at the most, Gene's hand bothers her quite a bit. I say bothers her, it bothers her from what I visualize and I have heard her complain sometimes, but without complaining you can see
199 that it bothers her because she will raise her hand and massage her thumb.

Q. Would you show it to the Judge, please, what do

you mean by this? A. Well, as typing, she will raise her hand and do this (indicating). I have seen many of the girls when they are typing figures put their hands up and maybe rub them like this (indicating), but it is very noticeable that Gene has a habit of rubbing her hand in this manner.

Q. What is your opinion as to the plaintiff Miss Stull's work and performance ability? A. She is a completely satisfactory person, individual, in the job she has at the present time.

Q. What is her attitude toward her work? A. Well, above the average, her attitude is one that she will come in early, she does things to try to make things more pleasant for the people she works with and for, she is the type of individual that you enjoy working with.

Q. How many typists work for you, Mr. Ward? A. Four, at the present time.

Q. What is Miss Stull's typing ability compared to the other secretaries? A. Well, I would say that Gene's ability in any given period of time would be the normal
200 average that most of us would expect from any of the typists.

Q. I am sorry, I did not hear? A. I say I think her work would be the same or the same as the average that any of the other ones would do on a normal one or two hour basis. Gene, after a prolonged period of time, slows down quite considerably over the other girls.

Q. Can you see an actual slowing down, a difference, as compared to the other typists in your office? A. In times when there are typing that is over an extended period of time, yes, it is very noticeable that—I am trying to give a figure that might mean something, this is hypothetical, it is not actual, let's say, we have a lot of documents we are producing of maybe two or three hundred pages in length and so all the girls are typing at the same time and it is quite noticeable in the first hour or second hour of work that Gene is producing the same number or maybe one or

two more than some of the other girls. But as times goes on through the rest of the day, it is noticeable that Gene's output is less than some of the other people.

Q. Now, Miss Stull is a Grade 5, I believe she has testified? A. That is correct.

Q. Would you tell us, are you in a position to
201 recommend people for Grade 6 or promotions? A.

Yes, sir. If Gene has a GS-5, is on a register in the Pentagon within the Air Force personnel office and periodically they will come to the supervisors asking for recommendations for those people who are 5's and specifically if Gene would request another job, then her supervisor would be required to give her a supervisor's rating at that time for a promotion on the job.

Q. What rating would you give? A. Well, it would depend on the job.

Mr. Gregg: I didn't hear that question.

Mr. Cramer: What rating would he give as regards a promotion to Grade GS-6.

Mr. Gregg: I object, Your Honor.

The Court: You mean something in the future?

Mr. Cramer: Yes, ma'am.

The Court: I sustain the objection to that.

Mr. Cramer: I have no further questions then, Your Honor.

Cross-Examination

By Mr. Gregg:

Q. Mr. Ward, are you the supervisor, the gentleman who
202 looks over the work being done by the girls in your section? A. I am the program officer and the technical advisor to the officer in charge of the whole division, yes, sir.

Q. You are a civilian? A. Yes, sir.

Q. Who is the party in charge of the whole section? A. Col. Hoermann.

Q. Is he here today? A. No, he is not.

Q. Are you the only representative of your office who is appearing here today that you know of? A. To the best of my knowledge, yes. Col. Hoermann has only been in the office for about three months.

Mr. Cramer: May I state, Your Honor, for purpose of clarification for Mr. Gregg, we have also as a witness, one more witness, a young lady who is supervisory in charge of Miss Stull's work and she will be appearing today, Mrs. Concaugh, and I wanted to straighten that matter out.

By Mr. Gregg:

Q. Well, who is in charge of Miss Stull's work, what is the chain of command? A. Well, I guess like most offices, we have a team and one other girl is a GS-5, we have another one who is a GS-4 and we have a GS-6. The
203 responsibility of the GS-6, Miss Concaugh, who was just mentioned, she is responsible for the technical accuracy of all the typing done in the division so from that standpoint, she has responsibility for all the girls to assure technical accuracy of the work, properly typed, spelled, punctuation and such as this.

Q. Does this other girl also type? A. Yes, sir.

Q. In addition to typing, she is more or less the supervisor of the other stenographers in the office? A. From the standpoint of the technical accuracy of the typing, yes.

Q. And you are over her, again? A. Yes, that is correct.

Q. Did I hear you testify that most of the typing done in your office was with figures, numbers, rather than letters?

A. I said I thought most of our work was somewhere between 30 and 35% numbers, yes, at least that's what I think I said.

Q. All right. And is the typing volume in your office sufficient to keep all of the girls busy typing eight hours a day, or how does the work break down, approximately?

A. Well, we have a division, Miss Concaugh who is a witness, as I understand, who is the division secretary
204 to both Col. Hoermann and myself and acts as supervisor from the standpoint of technical accuracy of

all typing, Gene who is a branch secretary for one of the branches, another girl who is a branch secretary, and a GS-4 who works with Gene in the branch that she works in, so the work breakdown is generally that all of the typing workload, all of the office responsibility, administrative responsibility of each of the branches is covered by Gene and the other girls with the help of the girl Gene has working with her who primarily is a typist and a file clerk.

Q. All I was trying to find out is do the girls have enough typing to keep them busy typing, say, half a day, a quarter of the day, three-quarters of the day, or the entire day?

A. I would say that each one, of course, is slightly different, you'd have to look at each job. I would say Gene's job at the present time probably keeps her busy typing, as we are presently organized, probably six and a half hours a day.

Q. And the rest of the time she is doing what? A. Sorting mail, taking dictation, filing, supervising the other girl who works with her, laying out work for her to accomplish.

Q. Did you testify that all of your stenographers
205 appear to be under a strain after two or three hours of straight typing? A. Yes, I would say that every girl is under a strain after she's typed for three hours and I mentioned this, when we are producing one of the documents which is a long, cumbersome document.

The Court: I thought you said that with reference to numbers, the copying was numbers?

The Witness: No, Your Honor, in the document work that we do, there are about 30 to 35% numbers in anything we do. And in any paper we do, in almost any letter, there's maybe 30 to 35% numbers as an average piece of paper. On the document typing, which we have a number of documents we are responsible for, in this type of typing the girls will be typing eight, nine, ten hours per day because we will be working them overtime at this point, so at that point on document typing, all of the girls are under pressure because we are working against a deadline.

By Mr. Gregg:

Q. You see the girls raising their hands and opening and closing their hands and you see Miss Stull, as you say, massaging her hand? A. Yes.

206 Q. Massaging both hands or any particular hand or any particular part of her hand? A. Yes, I stated she massaged this thumb.

Q. In other words, applying pressure against it with the other hand? A. Like this, not like shaking hands, but something similar, where she rubs this finger and this thumb.

Q. You did testify that she is a completely satisfactory employee in your office? A. Yes.

Q. Her typing ability appears to be normal at least during the early part of the day, but after a long period of time she tends to slow down? A. This is true, yes.

Mr. Gregg: No further questions.

Mr. Carr: No questions, Your Honor.

Mr. Cramer: I have no further questions of the witness, Your Honor.

The Court: At this time, we will take a recess of five minutes.

(A short recess was taken.)

Mr. Cramer: Mrs. Joan Concaugh.

207 May I say Mrs. Concaugh is going to testify, she is the plaintiff's supervisor, and the next witness is the doctor and I am having a little trouble, he can get here after lunch and I respectfully request we have a bit of an earlier luncheon recess, Your Honor.

The Court: Very well.

Mr. Cramer: Thank you.

Thereupon—

Joan Concaugh

called as a witness by the plaintiff, being first duly sworn
was examined and testified as follows:

Direct Examination

By Mr. Cramer:

Q. What is your name? A. Mrs. Joan Concaugh,
C-o-n-c-a-u-g-h.

Q. What is your address? A. 1607 South 28th Street,
Arlington, Virginia.

Q. What is your occupation? A. I am a clerk-stenog-
rapher at the Pentagon.

Q. Does the plaintiff, Miss Stull, work in your office?
A. Yes, she does.

Q. Do you act as the supervisor of her work? A. Yes,
I do.

Q. Do you know that on August 12, 1962, she was
208 involved in an accident? A. Yes, sir.

Q. Did you work with Miss Stull prior to August
12, 1962? A. Yes, I did.

Q. What are Miss Stull's duties? A. She is a secretary.

Q. Does she do typing? A. Yes, sir, she types, takes
shorthand.

Q. Now, have you observed any change in Miss Stull's
work since August 12, 1962, and please keep your voice up.
A. Yes, sir, I have.

Q. All right. Tell us what changes, if any, you have
noticed in her work? A. Miss Stull's typing has slowed
down quite a bit and a large part of our job is tearing
documents, material, which Miss Stull has to do, which she
cannot do properly any more, and her shorthand has slowed
down some. And I have seen her constantly, you know,
rub her hand and hold it up and I have many times typed
for her because she cannot do her work properly.

Q. And you have typed for her? A. Yes, I have.

Q. Has she done anything else unusual in regard

209 to typing that you observed? A. She has stopped and been very tired and cannot continue doing her work.

Q. Have you ever seen her type with one hand only?

A. Yes, sir, I have, many times.

Q. And you have worked with Miss Stull for more than three years and three months since the accident? A. Yes, sir.

Q. Has her ability, in your opinion, to use her hand changed any during this period? A. Yes, sir, it has.

Q. In what way has it changed? A. She can't use it as properly as she did before, she cannot type as properly or do some of the other things that are required in her job.

Q. At work, have you ever noticed any unusual facial expressions? A. Yes, I have, sir.

Q. And what have they indicated to you? A. Like pain.

Q. Now, what grade are you? A. I am a GS-6.

Q. Do you believe that Miss Stull is entitled to a
210 higher pay grade, were it not for her hand injury—
I see objections.

Mr. Gregg: I object, Your Honor.

The Court: The objection is sustained.

By Mr. Cramer:

Q. What is Miss Stull's attitude about her work? A. Very good.

Mr. Cramer: I have no further questions.

The Court: Mr. Gregg or Mr. Carr, do either of you desire to cross-examine?

Mr. Gregg: Just briefly.

The Court: Very well.

Cross-Examination

By Mr. Gregg:

Q. Are you responsible to anybody over you for the work being done by the secretaries under you, in this case, perhaps Miss Stull? A. No, sir, I am not.

Q. Each girl is responsible for her own work? A. They are responsible to me for their work.

Q. But you are not responsible to anybody else for the work of the girls? A. Maybe I don't understand your question, sir. I review everything that is done by
211 the secretaries. When it is final, I send it to my boss.

Q. Where is that? A. Col. Hoermann and Mr. John J. Ward, I work for both of them.

Q. Who do you consider your boss? A. Both of them, sir, Mr. John Ward and Col. Hoermann.

Q. Are you required to file any reports with respect to the efficiency of the girls who are working for you? A. Yes, sir, I do, if I find they are not doing an adequate job.

Q. With whom do you file those reports? A. Mr. John Ward.

Q. Have you ever filed a report with Mr. Ward pertaining to the services or performance of the work by Miss Stull? A. To rephrase it, I don't basically understand your question, sir, by report what do you mean, like a written, typed thing that I feel she is not doing her job adequately?

Q. Yes. A. No, sir, I have not.

Q. Is it your responsibility to file such reports if you do feel that the girls are not doing their job adequately and properly? A. Depending on the circumstances, sir.

212 Q. In this particular case, you have never filed any report with any of your supervisors to the effect that Miss Stull is not adequately doing the job or the work that has been assigned to her? A. No, sir, because it is obvious.

Q. It is obvious that she is doing the work? A. No, it is obvious that she is not doing the job as adequately as she could do it.

Q. Didn't you just tell me it was your responsibility to file reports on unsatisfactory employees? A. Yes, sir, I did.

Q. Are you now saying that your responsibility is only present when the girl's work is not obvious to other people?

A. Sir, it depends, I understand your question, but everyone in the office knows about Miss Stull's boat accident, everyone realizes that she cannot do her work as adequately as she could before the boat accident; therefore, as long as they know the situation, I don't see why I have to tell them what they already know.

Mr. Gregg: I have no further questions.

Cross-Examination

By Mr. Carr:

Q. These reports go beyond your office, do they
213 not? A. Pardon me?

Q. These reports that are filed on the satisfactory or unsatisfactory efforts of an employee go beyond your office, do they not? A. It depends on what the boss's final decision is.

Q. Would you explain that, do you mean to say that the reports stop with the boss or are forwarded on at his discretion? A. Forwarded on at his discretion, yes, sir.

Q. In this particular case, no unsatisfactory reports have been submitted to your boss or beyond by you, isn't that true? A. That is true.

Q. And as far as you know, no unsatisfactory reports have been submitted by your boss on Miss Stull, isn't that also true? A. As far as I know, sir.

Q. How long had you known Miss Stull before the accident on August 12, 1962? A. About three and a half months.

Q. She had worked for you three and a half months?
A. No, sir, she did not work for me at the time of the accident.

Q. In other words, you did not supervise her work
214 prior to the date of the accident, isn't that true?

A. That is true, sir.

Q. So the comparisons that you are making are comparisons after the accident occurred? A. No, sir, I worked with Miss Stull at the time of the accident.

Q. But you did not supervise her work? A. No, sir, I did not.

Q. You indicated that she had some difficulty typing and some difficulty tearing documents, I assume that is because you are in a security element, is that right? A. Yes, sir, that is true.

Q. And this is a form of destroying the documents? A. Yes, sir.

Q. You also indicated that her shorthand had slowed down. Is she left-handed?

Mr. Cramer: I object, there is no testimony to that.

Mr. Carr: Yes, there was, she said her shorthand had slowed down.

The Court: I don't recall that she said her shorthand had, I thought it was her typing.

Mr. Carr: Yes, her typing, her tearing documents and shorthand had slowed down. I'd like that checked, Your Honor.

215 By Mr. Carr:

Q. Did you say that? A. Yes, sir, I did.

The Court: Very well.

By Mr. Carr:

Q. She is right-handed, is she not? A. Yes, she is.

Q. But this affected her ability to take shorthand? A. Yes, sir, you hold one hand with your book, if you have to hold it on your lap which frequently we do, you must hold it with your left hand, if you are right-handed. You must write with one hand and hold the book with one hand, sir, and this would absolutely slow you down.

Q. In other words, your testimony is she is unable to hold a shorthand book, is that right? A. For any length of time, yes, sir.

Q. You indicated, there was some confusion at least in my mind in one of your answers, you made a comparison between her ability now and her ability before and you said it was much less now. I assume you mean before the accident? A. Yes, sir, before the accident.

Q. Now, since the accident occurred, have you
216 noticed any improvement in her skills? A. No, sir,
I have not.

Q. How about the period of time between the accident
and the time that she had the operation, when she had great
difficulty, how about that period, was she worse then? A.
Sir, she couldn't do as she did before she had the accident.

Q. I don't think you understand me. In other words,
you told me today that after the accident had occurred, her
diminished skills have been more or less the same. But
isn't it true that immediately after the accident and up until
the time she had the operation, her skills were much less
than they are even today? A. I wouldn't say they were
much less than they are today, right after the accident, no.

Q. Is it your testimony she has not improved at all
since the date of the accident? A. That is right.

Q. Even though she went through a period when she
didn't use her hand at all for almost six weeks? A. That's
right.

Q. Is she no better today, she is still in the same condi-
tion as when her hand was bandaged? A. She couldn't
use it at all when it was bandaged.

217 Q. She's better than that, isn't she? A. Oh, yes,
sir, I am sorry, I misunderstood.

Q. Now, since her hand is out of the bandage and since
she's had her operation of August 1963, is she doing better?
A. She is doing better because she can use it, she could
not use it when it was bandaged.

Mr. Carr: No further questions, Your Honor.

Redirect Examination

By Mr. Cramer:

Q. Is it your testimony that the everyday usage of the
hand in your office causes problems for Miss Stull? A.
Yes, sir, I said that.

Mr. Cramer: No further questions, Your Honor.

The Court: You are excused.

You didn't have any questions, did you?

Mr. Carr: No more, Your Honor.

(Witness excused.)

Mr. Cramer: Your Honor, my next witness is the doctor.

The Court: He will be here at what time?

Mr. Cramer: He will be here to suit the convenience of the Court and I will call him immediately, Your Honor, whenever you feel you intend to reconvene.

218 The Court: I suppose the defense doesn't want to go on?

Mr. Carr: I have no objection to meeting the convenience of counsel. Have you?

Mr. Gregg: No.

Mr. Carr: I don't want to go on, to answer Your Honor's question, no.

The Court: Well, I suppose we can adjourn until 1:15.

Mr. Cramer: Thank you very much, Your Honor.

(The luncheon recess was taken from 11:45 a.m. until 1:15 p.m.)

219 AFTERNOON SESSION

(The proceedings resumed at 1:15 p.m.)

Mr. Cramer: Your Honor, the next witness and the last witness for the plaintiff Miss Stull is Dr. Douglas Koth, who is in the witness room.

Thereupon—

Dr. Douglas R. Koth

called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Cramer:

Q. Would you please state your name? A. Douglas Robert Koth, K-o-t-h.

Q. What is your address? A. The office address is 2221 North Buchanan Street, Arlington, Virginia.

Q. Doctor, would you please keep up your voice throughout your testimony? A. All right.

Q. Please give us a brief resume of your background. A. Medical School was at Marquette University, graduating in 1952, internship at Naval Hospital in Bethesda 1952 to 1953, residency period was between 1952 to 1960, 220 and in that time between 1953 and 1955, I spent two years full time in experimental surgery at Naval Medical Research Institute at Bethesda. Following completion of residency years, between 1959 and 1960, I continued at the Naval Hospital on the staff. On leaving the Navy in 1960, I went into private practice at my present address and I have been in practice in surgery there ever since.

Q. Your specialty then is surgery? A. That is right.

Q. And have you worked with the hand, surgery of the hand generally? A. Right, although this is general surgery, we all have some of our likes and some of our specialties and when I was in experimental work, I was working with the tendon surgery and became interest in the hand and I have ever since.

Q. Now, have you attended the plaintiff professionally? A. Yes, I have.

Q. When did you first see her, referring to your records, if you need to? A. Well, I'd better (looking at records). I first saw her in my office on August 17, 1962.

Q. Was she referred to you by another doctor? A. 221 Yes, she was referred to me at that time by Dr. Mandamis.

Q. Did you take a history of the plaintiff's condition? A. At that time, yes.

Q. What were her injuries? A. She had sustained a two and a half inch laceration at the base of the left thumb which had also divided the digital nerve and this had been repaired at Fort Belvoir. She was referred to her family

doctor for suture removal and follow-up care which was Dr. Mandamis. He is an internal medicine doctor and he referred her to me because of the surgical aspect of this condition.

Q. As relates to the nerve in the left hand, what did you find had happened as a result of the accident? A. Well, immediately following, not immediately but as the healing of the wound progressed, there was persistent pain and finally a palpable lump was present which was acutely tender and this was diagnosed at that time as a neuroma. This neuroma was removed surgically—is that far enough?

Q. Doctor, as regards her digital nerve in her left thumb, what was the injury? A. It was divided, severed.

Q. The digital nerve was severed? A. That is right.

222 Q. Is that a deep nerve in the hand? A. Actually, your digital nerve is deep to your muscles of your thumb in the palm part, as it progresses out to the finger. It is not real deep, no.

Q. You say you have the records of the operation performed at Fort Belvoir? A. Yes, I obtained those.

Q. Could you tell us the reasonable value of the services rendered there? A. To carry out something like this myself, I would say about \$100 would be a reasonable charge.

Q. Dr. Koth, would you please describe in your own words and terms, to the Court, the medical course of events after the plaintiff received her initial treatment from you? A. Starting at the initial treatment, my initial treatment consisted mainly of suture removal and treatment of the wound itself, since this was tender; this was infected because of the type of injury happening in the rather dirty river, there was a good deal of debris that was still remaining in the wound that couldn't particularly be washed out at the time it was put together. This manifested itself as some inflammation with little lumps and during the care of this wound, a biopsy was taken in my office to see whether there was any foreign

223 body left in there that could be taken out. This, however showed it to be nothing else but embedded dirt and grease. This in itself sets up quite a scar tissue reaction, all the firmness we were feeling was secondary foreign body reaction to this material that was in the wound. Again, in May of 1963, we slowly began to feel—

Q. In May of 1963, did you say? A. I began to feel the mass, yes, the tender mass, and this was diagnosed as a neuroma.

The Court: What is a neuroma, in layman's language?

The Witness: A neuroma, in layman's language, is a mass located at the point of either injury or—injury, say in severing or squashing a nerve, mashing it, I am trying to use terms that everybody will understand, which is formed of a wild growth of the nerve ends so that they do not connect with each other but actually, under the microscope, run in all different directions and therefore you have this lump formed. I hope that explains it.

The Court: Yes.

By Mr. Cramer:

Q. How did you discover a neuroma? A. Typically, they become tender and when you look at the tender area you feel the mass, so as this became more and more
224 tender, I began to feel the mass and we diagnosed it as such.

Q. Please continue on. A. Let's go back. Between the time of the injury and the time of May 1963, she had made several visits at the office because of continued pain in this thumb and also because of weakness in this thumb. I did take X-ray examination of the hand at this time, trying to find some foreign bodies, and so on. I already explained how I finally decided to biopsy the masses since they didn't show on the X-ray.

Therefore, we bring ourselves back to 1963 again. In August of 1963, I did put her in the hospital and, under a general anesthesia operation, did two things: No. 1,

took out the neuroma and put the nerve back together again; No. 2, because of the excess of dirt, as I told you that was in the wound, a great deal of the tissue had become very firm, solid, with scar tissue, so in order to maintain the soft pad as much as possible over this area, I removed the foreign body reaction at the time of this procedure to permit not only better healing but actually to enable her to have more of a pad over this nerve. The wound itself healed well, and although we had a good return, as you can expect with these procedures, there always was a continued pain in this area, of course of a

225 different type than with the neuroma, it was a pin-point, this was more of a deep type, aching pain, located near the base of the thumb overlying the area of the joint as well as the area of the muscle that operates your thumb, which is what forms that pad right at the base of the thumb, it is right in here where we have our discomfort and pain at all times.

Of necessity, in order to maintain good healing of this nerve, it is necessary to put that thumb at rest.

The Court: It is necessary to do what?

The Witness: To put the thumb at rest, to splint it and keep it in a position, taking off any tension from the suture lines. This in itself will make a finger pain-free. But as time goes on and when she began to use it after I had removed it from the splint, it continued to be painful at this problem area. And the muscle pad at the base of this thumb became smaller than the one that she had previously, which is due to an atrophy of the muscle, a decrease in the muscle mass.

I continually urged her to activity which she tried very hard, and also sent her to a physical medicine doctor to rehabilitate this thumb as much as possible. She increasingly used the thumb but her dexterity never reached its previous capacity and she still had difficulty, on her history, as far as work was concerned.

In February of 1964, these symptoms and these
226 residuals that I have just described to you still persisted and I must state also that the pain, the acute pain right over the base of the thumb, when you had any pressure on the nerve itself, was a very disturbing factor because it would come about when you would attempt to grasp something, either heavy or large, and make your grasp tight, the pressure would be increased here which would be to the extent that you'd have to open your hand, it is a reflex nature, you can't really control that, this in itself is also a problem.

By Mr. Cramer:

Q. Doctor, you said that Miss Stull, the plaintiff, has a deep and constant aching in the thumb, is that correct?

A. Yes, that is one of them, the second one is the acute pain that happens with pressure right over the nerve.

Q. So there are two types of pain, one is an acute pain with pressure over the nerve and the other is the deep aching? A. Deep aching, right.

Q. Now, does the plaintiff have complete function of her hand now? A. No, she has not complete function of her hand.

Q. Please describe the function of the thumb as related to the hand as a whole. A. Generally and based on a
227 lot of work that has been done over the years both in compensation work as well as ordinary legal work, the medical profession has generally come down to the ability to evaluate these disabilities and these functions in the thumb. Now, the thumb function has to be considered not only as a thumb but also in its relationship to the hand, and because the greatest use of the hand is that of opposition, and opposition is defined as being able to oppose the thumb to the other fingers, remember, your fingers go together sideways, where your thumb will oppose them facing them and it is this which permits your grasping function and gives our hand its usefulness. Therefore, we

assign basically the opposition as one function of the thumb and in her this is limited at 20% impairment. This again is based on measuring the distance that you can from the base of the thumb up to the hand and measuring its impairment.

Q. Excuse me, Doctor, but now you are talking about the limitations of the hand as a whole, is that correct? A. I haven't come to that yet. As I say, we find out what is wrong with the thumb and then we relate it to the hand.

Q. Please continue. A. So the biggest function of the thumb in its work is opposition, that was 20% impaired.

The next thing is the adduction of the thumb which
228 is placing the thumb against the rest of the hand,
in other words, to hold it in that position. This
was 10% impaired.

The other is the movement of the individual joints in the thumb, which considers the joint where it is hooked onto the hand and also the joint between the two bones of the thumb and here we had a 15% impairment of the joint we have at the thumb, where it is attached to the hand. Now, this is just related to the thumb.

Now, when I relate all of this to the functional value of the thumb, we say that there is a 60% functional value in its opposition, whereas the other two functions, the adduction and the flexion of the joints only have a 20% function, which gives you 100% function of the thumb.

So those figures I gave you before have to be adjusted in line with these percentages. The combining of all of these values that I gave you finally end up with a total, in my estimation, of an estimated functional loss of the thumb only of 17%, and this would only be related to the hand.

Now, in considering the function of the thumb as part of the hand, you also have to include both pain and strength. Actually, pain can cause 100% loss of a finger, if it can't be used, and strength can, too, even though everything can be moved secondarily, if you can't do it yourself, it is not any good.

229 Now, in her situation, the pain that she has causes a definite interference with her activity, this is on a basis of a classification of four levels, at this level we assign 40% impairment. Strength also has been limited in her examinations, although her physical medicine treatment helped increase her strength, we can consider that she has a 10% impairment of the strength of this finger.

In relating this all to the function of the hand, we put them all together and it adds up actually as her having a 25% estimated impairment of hand function.

Q. So then your conclusion, after taking all these factors into consideration, is that total loss of function of the left hand is 25%? A. That is right.

Q. Dr. Koth, do you regard this degree of disability as permanent? A. Yes. Three years has passed since this initial injury and I feel that the present functional loss can be considered permanent.

Q. All right, you believe it is permanent. Doctor, what type of activities does this injury interfere with? A. Basically, in activities where you have to use the thumb.

I don't know of any activity where you'd use your
230 hands that you specifically remove your thumb out of it, so as far as I am concerned it is all activity of the hand.

Q. Now, the plaintiff is a secretary, she is a typist, medically can it be expected that the injury to her hand will interfere with her typing functions? A. Typing functions as well as other functions at work, wherever she uses her hand.

Q. The plaintiff has testified that in sewing where she has to grab a cloth, that this gives her problems, or in peeling an orange, I believe she testified, that the ability to grab either the knife or the orange is difficult, and that in doing general housework, this interferes. Can all this medically be expected from this injury? A. Yes, as I say, the functional loss includes the use of that hand whether it is typing at home or typing at work or whether it is

doing something at work or doing it at home, you still have a loss of use.

Q. Dr. Koth, are there objective, as opposed to subjective, indications of the limitation? A. Well, yes, this is what I tried to go through in explaining how we arrived at this functional loss, these are all objective findings from the standpoint of the functional loss of the thumb.

231 True, the term subjective with reference to pain is part of it, but the ability to go and elicit pain in spite of the individual is an objective finding and at the same time, strength is an objective finding; you can tell if a patient is fooling or not.

Q. So these are objective? A. That is right.

Q. Doctor, does this injury, I believe you say that this injury causes pain to the plaintiff, is that correct? A. That is right.

Q. Does this patient complain of pain during inclement weather? A. Yes.

Q. And keeping your voice up, Doctor, would you please tell us what this pain during inclement weather is due to? A. To give a specific reason is hard in general, just as it is hard to say how one can predict the weather. But essentially, when you do have a nerve either operated on or injured, you will get neuralgic pain which can't be explained, due to inclement weather. If you have a joint that has not been used for awhile, similar to a person breaking a bone and after everything is healed, the joints that were put at rest also will respond to inclement weather. So we just generally term these things

232 due to a neuralgic or arthritic type pain, not that the patient has arthritis, but basically it is a similar type discomfort.

Q. Do you find that this patient-plaintiff has a neuritis condition in her hand? A. I would call it more of a neuralgia.

Q. You find a neuralgic condition? A. Neuralgic condition basically indicates pain of a nervous source. Now, the

other term would be a myalgia, m-y-a-l-g-i-a, which would be pain from the muscle source. Now, the muscle operating that thumb, the thenar muscles are decreased in their size, there is an extra additional strain put on them to try to increase the function to normal and as a result, you will also get this same aching pain down in the muscle area. So it is between the myalgia and neuralgia that would mainly be the cause of these deep aching pains that she has.

Q. Did Miss Stull complain of a neuralgic type pain due to the air conditioning in her office or at home? A. Yes, she did.

Q. Is this to be expected from her injury? A. Yes, it can, very definitely, just as damp weather can cause pain.

Q. Did you advise her to do anything to help out
233 this condition? A. Well, it is pretty hard to tell them to move the air conditioner, so I told her to wear a glove on that hand or else to pad it to try to make it more comfortable.

Q. Is this injury likely to cause pain in the future, Doctor? A. Yes.

Q. Briefly, again, Doctor, what did your diagnosis and observation indicate as to the type of pain plaintiff experiences?

Mr. Gregg: I object, Your Honor, we have gone into that at least two or three times.

Mr. Cramer: I will rephrase the question.

By Mr. Cramer:

Q. Dr. Koth, you said that she has a deep aching type pain in her finger and also sometimes when the finger or the thumb is struck or that portion of the hand is struck, she has a sharp aching pain. Now, what is the general medical opinion on pain caused by damage to digital nerves of the hand?

Mr. Gregg: I object, Your Honor. I think this witness can answer—

The Court: Would you read the question, please.

(The question was read by the reporter.)

234 The Court: That question doesn't mean very much to me. What are you trying to get him to tell you?

Mr. Cramer: I think Dr. Koth testified that the general medical opinion is that damage to digital nerves of the hand caused a deep constant aching pain, Your Honor.

The Court: Yes.

Mr. Cramer: I would ask him to testify to that, as to what is the general medical opinion on that.

Mr. Gregg: I object, we are not dealing here with general medical opinion, we are dealing with the opinion of this witness.

The Court: I will sustain the objection to the form of the question.

Mr. Cramer: Your Honor, I will withdraw the question in view of the fact he has already testified he has found this type of pain.

By Mr. Cramer:

Q. Dr. Koth, since April of 1964, the plaintiff has seen you on several occasions, has she not? A. Yes.

Q. Now, did the plaintiff call you on the phone since April 1964; if so, for what reason and what did you
235 do, call you as opposed to seeing you? A. Yes, she called me on several occasions and basically it was with reference to the discomfort she was having with that finger; included in this were some of the problems related to the air conditioner, to the work at home and to not being able to sleep because of the ache, and so on. And in handling these, I did over the phone give her advice and also I believe gave her medication, some analgesics to help relieve this.

Q. Since April 1964, have you referred her to other doctors in addition to yourself? A. Yes, I did ask her to see a neurologist, and I know previously I had sent her to the physical medicine doctor.

Q. Physical Therapist? A. Yes.

Q. Doctor, if Miss Stull had a deep aching pain in her hand, why hasn't she consulted you more frequently?

Mr. Carr: Your Honor, that is an improper question for the doctor to answer, that is going into the mind of the plaintiff at this time.

The Court: I sustain the objection to the form of the question.

Mr. Cramer: Very well, Your Honor.

By Mr. Cramer:

Q. Dr. Koth, what can you do to alleviate the pain
236 that Miss Stull, the plaintiff, is now suffering? A.

To alleviate it, as I stated, No. 1, analgesics; No. 2, I already stated from the discomfort of temperature, to keep it warm, wearing a glove, from the discomfort of pressure when she grasps something which will cause pressure over the nerve, to wear a padding over this, I advised her to wear a four-by-four with a little adhesive tape over the area to increase the padding in this joint where there is pressure pain; and No. 3, and I mentioned this, I said to get rid of it completely, you would have to cut the nerve.

Q. You say to get rid of it, you'd have to cut the nerve in her hand. Why don't you cut the nerve in Miss Stull's hand? A. Because the resultant anesthesia of one side of her thumb would be a greater disability than actually what she has now.

Q. Is the plaintiff likely to incur future medical expenses because of this injury? A. I think she would be, but I think they would be related more to the physical medicine type rather than actual surgery.

Q. This is physical therapy, then? A. Yes.

237 Q. How many times did you see the plaintiff? A.
Gee, I'd have to count it up, was it twenty-some times?

Q. Would twenty-five times sound—A. That would be all right, the other times would be hospital visits like when she was having her neuroma out.

Q. Did you visit her in the hospital in addition to the twenty-five times in your office? A. Yes.

Q. And your total charges are what, Doctor, to date? A. For all of it, \$240.

Q. And you recently saw her this week, did you not? A. Yes, I did.

Q. Was that a \$10 charge additionally? A. Oh, yes, that is right, so that would be \$250 altogether.

Mr. Cramer: Thank you, Doctor.

Cross-Examination

By Mr. Gregg:

Q. When in 1960, Doctor, did you open your office for practice? A. Just about January, I think I rented the place in December 1959 and I opened about January of 1960.

Q. So you had been practicing for approximately 238 two and a half years at the time that you first saw this patient? A. Oh, heavens, no, I was in the Navy before that, practicing surgery. I was only in civilian practice from 1960 on.

Q. You just completed your residency in 1960, did you not? A. It was between 1959 and 1960.

Q. Well, between 1959 and 1960, you completed your residency? A. All right, yes.

Q. So you weren't even authorized to practice medicine until you completed your residency? A. Not to practice medicine, you don't need a residency to practice medicine, you mean surgery.

Q. Practice your specialty? A. All right. But during the time that you are taking your residency, you are also doing surgery, and particularly in the service, the residents handle a majority of the surgery except you are under supervision, and the difference is supervision once and no supervision later, you are once supervised and the next time you are the supervisor.

Q. Now, Doctor, the first time you saw this patient 239 was on August 17, 1962? A. That is right.

Q. At that time, I gather the plaintiff had evidence of a fairly recently sutured scar along the inside of her thumb? A. That is right.

Q. And at that time, did it have the sutures still in it? A. Yes, it did.

Q. And did you remove the sutures on that occasion? A. Yes, I did.

Q. At that time, was Miss Stull complaining of aching and paining in that thumb for 24 hours a day? A. At that time, the whole thing was sore because there was a lot of secondary inflammation reaction, she couldn't even move it, so it sure was sore for 24 hours a day, particularly with any pressure on it, quite tender.

Q. You say it would be sore 24 hours a day because of the infection in the area? A. Let's call it inflammation, there wasn't any gross pus like infection but there was a lot of inflammation because of the type of injury and it definitely would be tender.

Q. At that point, did it occur to you, Doctor, that you could open the wound and clean out the area, if it had not been properly cleansed and debrided by the original treat-physicians? A. There was no indication for this, at that time.

240 Q. No indication that such would be necessary?

A. That is right.

Q. In other words, it just appeared to be a cut with sutures and you removed the sutures? A. Yes.

Q. That appeared to be all that was necessary? A. No, I applied a splint in order to maintain this in as much of a quiet position as possible to keep the pain down.

Q. You next saw the patient on August 20, three days later? A. Yes.

Q. Had the condition improved by that time? A. Yes, it had improved.

Q. And you saw her again on August 25th? A. 28th.

Q. Twenty-what? A. August 28.

Q. I am looking at a bill that you rendered dated Febru-

ary 21, Doctor, and also your bill that is in evidence here dated November 5. A. Well, maybe my five looks like an eight here, but five or eight, go ahead.

Q. Approximately a week after the first time that
241 you saw her. Can you tell me what the condition of the wound was on that occasion? A. Surely. At this time, the wound was healed from the standpoint of the cut itself. Also, the muscles themselves at the base of the thumb were found to be weaker and flattened. Every time she would move it at that time, there would be a painful pulling sensation, which I am sure was at the point of the suture of the nerve.

Q. You say every time that she moved the thumb in any direction or just certain directions? A. Here it is listed mostly in extension which means picking the thumb up and I also requested at this time because we had good healing of the wound, that she should see her physical medicine doctor, send her to Dr. Buchanan for rehabilitation.

Q. Rehabilitation of what? A. The thumb and the thumb in relation to the hand.

Q. Well, didn't you just say that the only problem was that she felt a pain when she was moving her thumb? A. No, I also said the muscles were atrophied and this implies a weakness.

Q. Doctor, this is a week after the first visit, muscles don't atrophy in a period of a week. A. The thenar
242 muscle does and the muscles of your thigh, one week you can get a measurable difference, for instance, even in muscles that large. Certain ones we use a lot do, the thumb is one we use more than others. This was probably a week after but also was sometime since the injury, which was when?

Q. August 12, it would be about two weeks after the accident. A. Yes. Wait a minute, I am sorry, I must apologize. You are right. I have August 25th here, and I was reading some notes. Well, this is my error, I got the wrong page, all the dates are the same in August and I

had picked 1963 instead of 1962, but they were so similar. If we can disregard what I said and go back over it again, I will go through it.

Q. It was a question of atrophy within two weeks after the accident. A. Right, right. The inflammation that I spoke of required some soaking and I thought I had her on soaking and I know I had immobilized it for some time. And I have a statement here, too, that on August 20th I had requested that she would see Dr. Buchanan, only three weeks after we had it immobilized, so when I saw her on August 25th, the redness and inflammation had decreased enough there was generally, the wound was clean and showed healing but we had to continue the soaks because there was some swelling. She was referred to Dr. Buchanan for a consultation as to when to start physical therapy. She again returned on September 1st.

Q. Let's stop right there, Doctor. Will you tell me whether or not your records for the period of August 25, 1962, showed that the plaintiff was complaining of aches and pains in that area 24 hours a day? A. I do not have that stated on my record, no.

Q. Do you have that shown in your records for August 20? A. I just say immobilized for three weeks because of pain and send her to Dr. Buchanan. It doesn't say for 24 hours a day.

Q. September 1st, do you have any indication on your records that the plaintiff was complaining of aches and pains in that area 24 hours a day? A. Not on September 1st.

Q. On December 1st? A. December 1st, I have an indication again that although the wound is well healed, there is still persistent pain and swelling, throughout the period.

Q. Is it your recollection, Doctor, that that persistent pain was 24 hours a day? A. Not at that time.

244 Q. Is it your understanding that at the present time she has pain 24 hours a day? A. Yes, it is.

Q. Even when she is sleeping? A. Enough to the point that it will wake her up. Now, you can only have pain when you are awake, so you can assume there was enough pain during the sleeping period to wake her up, but you can't say you have pain when you are sleeping, you are sound asleep.

Q. You saw her a total of five times during 1962? A. That is right.

Q. You can look at your bill here. A. I have another copy of the bill here. Go ahead.

Q. Then you saw her one, two, three, four, five, six, seven, eight, nine, ten, eleven, times during 1963? A. That is right.

Q. And five times in 1964? A. No, I didn't see her five times in 1964 and that is not on the bill, either.

Q. How many times did you see her? A. Two times.

Q. Two times? A. Yes.

245 Q. February and April, 1964? A. That is right.

Q. Then you didn't see her from April 27, 1964 until August 13, 1965? A. Yes.

Q. And you didn't see her again until October 13, 1965? A. Yes.

Q. And then the last time you saw her was in order to be in a position to testify at this trial with respect to her current condition, isn't that right? A. No, the last time I saw her was just last Friday when she had what appeared to be a mass growing at the base of the thumb, which we checked out and this is the reason why I saw her, it wasn't just to testify at the trial, it was for the problem that she had.

Q. That was last Friday? A. That is right.

Q. What time last Friday? A. About six o'clock in the evening. I had to squeeze her in at the end of the schedule.

Q. Did you find any mass in there? A. No, the mass that she actually thought was there, actually was the
246 enlarged or the relative enlargement of the joint space because of the absence of the padding over

that area. I spoke about this before, the subcutaneous tissue had become rather scarred, this had to be removed and we brought in as much fat as possible but there is still less on that side than on the other side, so the base of the joint is subject to constant trauma and would enlarge and become a little bit bigger just as if you bump your knee all the time or any other boney area, and this was the definition of the problem.

Q. You know, of course, that Miss Stull is left-handed?

Mr. Cramer: Pardon me? I didn't hear that.

By Mr. Gregg:

Q. I mean you know that Miss Stull is right-handed? A. Right-handed, yes.

Q. And this injury was to the left hand? A. That is right.

Q. Are you familiar with the activities or movements or actions of a person typing? A. I think everybody develops their style, but with reference to Miss Stull as far as she has defined to me previously her activities as typing, she had always used her thumb on the space bar, now since the time of the injury she doesn't use her left thumb on the space bar any more.

Q. She says she doesn't use the thumb. Is there
247 any medical reason why she could not use the thumb on the space bar? A. The only medical reason would be loss of strength and inability to bring it down that far. She said she can't spread her hand that wide, as she used to.

Q. She can bring her thumb down— A. She'd have to twist her hand over to do it. I think this would be a little bit harder than actually bringing it down.

Q. Can you demonstrate to me, Doctor, what her limitation of motion is so far as bringing her thumb down is concerned? A. From the standpoint of measuring, you ordinarily have about an 8 centimeter spread between the pad of the thumb and the palm itself. Hers, in order to bring it down to a grasping position, is 4. Now, if

you turn your hand over and put it on a typewriter, in order to bring it down to the space bar, your hands are up on top, there is probably, I haven't measured it, but I assume it would be an 8 centimeter spread and it would be difficult to get it down there because you've still got to bring it down in the same area. What I am saying is with your hands still on the typewriter, you would have to turn this hand over to go ahead and she could get there, so it would be adding one more motion as compared to the other hand where she has enough strength to bring her finger down and hit the bar.

248 Q. You don't know whether she ever used the left thumb in typing? A. Only from what she told me, that she did use the left thumb originally.

Q. Would the fact that a nerve had been severed be the competent producing cause, based upon a reasonable degree of medical certainty, of a limitation of motion in the manner that you just described with respect to the thumb? A. I would say it is part of it, for the simple reason that you have scars and fixation of that nerve and you also have difficulty in extending it because of pain by putting stretch on the nerve, so I answer your question yes.

Q. The nerve itself would not prevent the thumb from going down? A. The injury to the nerve and its healing processes will prevent the thumb from going down, yes.

Q. You mean merely because a person would rather not stretch the nerve, is that right? A. No—well, yes, the pain stops it.

Q. Now, we have seen the patient here in the courtroom and we have heard testimony that she fairly frequently massages and rubs this hand in the area of the scar and the area of the left thumb. Is that consistent,
249 Doctor, with your testimony that she has sharp pains on pressure in the area of this wound? A. Oh, sure. During the period immediately postoperative, I had her using hand lotion and rubbing that frequently from the standpoint of keeping it as soft as possible and as

healthy as possible. The sharp pains that I speak of are particularly related to grasping and they occur when you grasp an object, as we all do, putting pressure right in that area, they when you try to squeeze and hold something, that is when you get the sharp pain. But the use of the other hand in just massaging it isn't going to cause that same pain.

Q. It isn't going to cause any pain at all? A. Not when you put hand lotion on it and rubbing it, this in in keeping with what I told her about keeping it warm, I said put a glove on. When she can't put a glove on in the office, maybe she massages it to keep her hand warm.

Q. In other words, it is only when she happens to press a particular area in the thumb where the nerve was that it causes this sharp pain you are telling us about? A. The sharp pain part, yes.

Q. And of course, if you just happened to lift something and you just happened to touch that particular area, it would create the pain that you are talking about? A.

Yes, but it is more than just happening, it is located
250 in a spot that we all touch every time we use our hand.

Q. How big a spot is that? A. The whole area that is tender and in measurable amounts—Oh, I'd say about a half a centimeter in diameter, maybe between a half to a centimeter, located right at this point.

Q. That is more than the area merely covered by a nerve coursing through there? A. The nerve itself lies there and is covered by tissue and that again, as I told you, is still a little bit firm, you can press, you don't have to take a pin and touch the nerve, you can press on the firm tissue around it which will secondarily press the nerve and you will get the same response. At the same time, as I explained earlier, there is also being a result from pressure on the bone around that area, because it is more exposed and that would be a larger area. All of those give you a more acute pain, but the pain and pressure on the

nerve is a little bit different than the pain and pressure on the bone, it is not quite sharp, but it is severe enough that when you tighten up, you open up your grasp because it hurts.

Now, if you could grasp a small, tiny object with your fingers and not touch that point, you wouldn't get
251 that pain. But as I explained before, the opposition of her thumb to her hand is limited so that she can't do like that, she has to do like that, and you can see where it ends up down here at the base of your hand, this is also the point where her laceration was located and where the scar tissue was located.

Q. How many centimeters go to make up an inch? A. Two and a half, roughly.

Q. So one half of a centimeter would be less than an eighth? A. Figuring it out, yes, I like to think of it as just as half a centimeter and not related to inches.

Q. Now, you have also testified that you feel that this patient has a degree of pain in that area, both, as you say, a sharp pain whenever she grasps something hard and also a dull pain at other times, damp weather, when working too hard, and so forth. That is not quite the same as saying she has pain 24 hours a day, is it? A. What is not quite the same, now?

Q. To say that a person has sharp pain on grasping something and dull pain in damp weather, when working too hard, when in an air conditioned room, and so forth? A. All right, I will say no, it is not the same as pain 24
252 hours a day. But I think you will have to qualify that provided you are under those conditions 24 hours a day, then you have pain. And as I qualified before, you don't know you have pain when you are asleep, you only know it when it wakes you up.

Q. In other words, if somebody were hitting there or if she were hitting her hand in that sore area 24 hours a day, she would have pain there 24 hours a day? A. I think the term 24 hours a day is a matter of semantics, I just tried

to explain that to you. A person falls asleep, so you can't say you have pain then. But we say 24 hours a day meaning it bothers us all the time during our waking hours.

Q. Didn't you also take a history to the effect that this patient's pain is at certain times? A. Yes.

Q. Doesn't that imply at other times there isn't any pain? A. It implies it is more severe at certain times, depending on how the individual tell it to you. It doesn't imply it was absolutely absent, no.

Q. How was it told to you? A. It was originally told to me at the early visit as this was progressing that she
253 had her pain more severe at the times just stated, with pressure and so on. But as she progressed to having a job doing more typing and more use of that thumb or attempt to use it, she said it was becoming more and more continuous even to the point that it began to bother her at night and interfere with her sleeping and she would wake up with pain in the morning as well. Now, whether there were ten minutes here and there when she was free from pain, I don't think is something that every patient will tell you in their history. It amounted to really having pain a majority of the time.

Q. In this case, Miss Stull did not sustain any injury to the joint? A. No.

Q. And she did not sustain any injury, as far as you can see, to the muscles in that area? A. Oh, yes, she did, the muscles were cut in order to get to the nerve.

Q. Did they heal satisfactorily? A. They healed, yes.

Q. Satisfactorily? A. They healed satisfactorily from the standpoint of healing, yes.

Q. Now, your report of February 1964 indicates
254 that you performed an X-ray examination of the hand in December of 1962? A. Yes, I think I mentioned that, that was because I was suspicious of a possible residual foreign body.

Q. Did you locate any suspected foreign body at that time? A. No, that is why I did the biopsy because the

foreign bodies were something that were not visible on an X-ray.

Q. When the X-ray report came back negative, did you conclude from that that there was no foreign body in there? A. No, I did not.

Q. I notice that you didn't do any further test until May of 1963, five or six months later? A. It wasn't necessary.

Q. Because the condition— A. I did the biopsy in the office and I finally found out what it was.

Q. It wasn't necessary because the conditions that you found did not warrant further operative procedures in December of 1962? A. December of 1962, we were developing a condition and at that point I made a statement in my notes saying that there is an area and I described where, which is developing more localized pain and may be
255 the trigger of the pain to this hand. It was on the next visit that this was localized enough that it could be defined as a neuroma in itself.

Q. The next visit was approximately six months later? A. No, excuse me. On May 18, 1963, at the time I said there still may be a foreign body which could not be seen on an X-ray—I should read these before and not trust my memory. So it was as I stated.

Q. Then was the patient complaining to you in May of 1963? A. Yes, she was, about pain in the depth of the wound particularly, as well as the local pain.

Q. Any particular time? A. I do not have time mentioned.

Q. Any particular occasion? A. I said as before, on pressure and just pain in the wound, this was was not specifically stated as to how, when, where or what.

Q. May I see your notes, Doctor? A. Surely.

Q. Now, we have in your file, Doctor, a reference to a note that you sent to a Dr. Buchanan? A. No, that is the note that Dr. Buchanan sent to me.

Q. She makes reference in there, does she not, to
256 a note that you sent to her?

Mr. Cramer: Your Honor, I am going to object to any reference to notes to someone who is not a witness, and therefore I object to any reference to these notes. Dr. Buchanan is not a witness here.

The Court: He was being asked something—

(Mr. Gregg conferred with the witness.)

Mr. Cramer: Excuse me, gentlemen.

The Court: I understood that Mr. Gregg's question was as to something which this doctor had allegedly written to someone else. Is that the case?

Mr. Gregg: That was the question and I asked the question, Your Honor, because the information is in quotes and it followed Dr. Koth's name and I assumed it was his.

The Witness: The quotes here is where she is taking this from her records, this is also in quotes down here and this is removed from her records. It is quotes from her records.

Mr. Cramer: From Dr. Buchanan's records?

The Witness: Yes.

By Mr. Gregg:

Q. This, then, is information by Dr. Koth? A. This is
Dr. Buchanan to me.

257 Q. In a report to you? A. That is right.

Q. And you had referred this patient direct, yourself, to Dr. Buchanan? A. That is right.

Mr. Gregg: Your Honor, I ask that Dr. Koth's conclusions—I mean Dr. Buchanan's conclusions, since they are part of this Doctor's file, be read in evidence.

Mr. Cramer: Objection, of course, Your Honor.

The Court: The objection is sustained. If you want this doctor, you will have to have that doctor.

Mr. Gregg: I assumed because this doctor had referred the patient to the other doctor and got a report from her that perhaps the substance of the report would be admissible.

The Court: Well, even so, she is the only person who could give her opinion.

Mr. Gregg: Very well.

By Mr. Gregg:

Q. Where are your notes pertaining to the original—

A. This is what I had my finger on.

Q. I am getting to it. A. No, right here, this is where they start, this is my first visit, these were handwritten at that time.

Mr. Gregg: I want to see the balance of his records.

258 The Witness: Why?

Mr. Cramer: I am going to object, Your Honor, his own records are certainly as privileged as can be.

The Court: Now, any records that he, himself, has used in testifying, Mr. Gregg would be entitled to see.

Mr. Cramer: Yes.

The Court: Now, I have noticed him looking at some papers there and I allowed him to do it since no one objected, but technically he isn't supposed to use his records unless he has exhausted his recollection. So the only papers which you may see are those that he has used.

Would you separate those that you have used from those that you have not used?

The Witness: All right.

Mr. Gregg: Your Honor, I object, I think I should be entitled to look at all the doctor's records. I don't know how I can properly cross-examine him unless I have all his records.

The Court: Well, you have heard everything that he said.

Mr. Gregg: But there might be things that he didn't say.

Mr. Cramer: Your Honor, this would be confidential as Mr. Gregg claims that statements made by his
259 witnesses are confidential to the United States Coast Guard. Certainly it would not be admissible,

Your Honor, and I respectfully submit Your Honor is perfectly correct in asking him to show records based upon his testimony.

Mr. Carr: Your Honor, the privilege has been waived completely and the records are part of the whole case. The condition of her thumb is the basis of her entire claim. She has waived the privilege when she made this demand and presented her own doctor to prove it.

The Court: Well, I didn't say anything about privilege myself. When he comes and testifies, certainly to that extent the privilege has been waived.

The Witness: These were brought for my information only and we could have prepared them completely, if the Court wanted to subpoena them and have them presented in evidence.

Mr. Cramer: Doctor, you are going to have to say that again.

The Court: You know, you are difficult to understand because of your manner of speaking. Now, I don't believe the reporter—

Did you get what he said?

The Reporter: I believe I was able to hold onto it.

The Court: All right, suppose you read it, and
260 Doctor, see if this is what you said.

(The answer was read by the reporter.)

The Witness: That is what I said.

The Court: Suppose you just be seated, Mr. Gregg, while he separates them.

Have you separated the documents that you referred to, from the rest of them?

The Witness: That is what I did. Please come up and we will go over them now.

By Mr. Gregg:

Q. Did you also use these other records here, Doctor, in the course of refreshing your recollection prior to testifying in this trial? A. No, I didn't.

Q. Are they a part of your file? A. Yes, they are.

Q. Are they pertinent to this case? A. I believe everything in this file would be pertinent to this case, yes. However, I don't feel some of my records, personal letters to me as well as from other doctors should be opened unless you talk to those doctors. I don't also feel the records included here, which includes certain of the copies of the bills, et cetera, need be interspersed in here.

261 But the amount of information you are requesting is pertinent and this is what I have here.

The Court: The records that I saw him referring to, for the most part, were typewritten sheets.

The Witness: That is these, they are summaries of the handwritten sheets.

The Court: He spoke very rapidly and it was obvious he was reading something.

Now, whatever you referred to and read from, you are to let him see. That is, whatever you referred to in your testimony that you were reading from.

The Witness: That is what I have here. I was alternating back and forth, Your Honor.

The Court: All right.

By Mr. Gregg:

Q. In other words, you were referring not only to the typewritten documents but alternating back to your original handwritten notes? A. That is right.

Q. Doctor, would you read your note in reference to September 1, 1962? A. Doing well, discharged, healed in full range of motion. This was September 1, 1962.

262 Q. Within a month of the accident? A. I must add that these notes mean things to me which they don't mean to other people when taken out of context.

Mr. Cramer: One moment, please, Doctor.

The Witness: I wanted to state, Judge, that these notes mean things to me that they don't mean to other people when they are taken out of context. One refers to another, many times, and I don't always repeat myself.

The Court: Mr. Gregg, you come back over here.

Mr. Gregg: He won't let me see his records except over there, Your Honor.

The Court: Well, you are speaking in such a way it is very difficult to understand you. You put your hand to your face, that keeps your voice from carrying, and then you look over the other way and that takes your voice over there. So, if we could hear now, what it is that you are stating?

The Witness: I said these records mean something to me that they may not mean to other people when they are taken out of context. One may refer to a previous visit and to a next visit and some things are implied.

The Court: Don't you date your records?

The Witness: Yes, but to go and read one, and then read a following one, doesn't always give you a
263 good idea what the one means.

The Court: Suppose you let me have the records that you have used to read off of or that you have used in your testimony.

(The records were handed to the Court.)

The Court: Would you pass this back to the Doctor, please.

All right, Mr. Gregg, you can go ahead.

Mr. Gregg: May I look over his shoulder again?

The Court: Yes, but I do think that when you are putting any question when you are standing back there, that you must speak up.

Now, the reporter has moved away from where she usually sits and she is sitting as close to both of you as she can get, so please speak up so you can be heard.

By Mr. Gregg:

Q. Will you read your notation with reference to September 20, 1963? A. Return of function satisfactory, but still has stiffness and residual tenderness, certain

motions, especially those putting stress on the free nerves, otherwise the wound is well healed.

The Court: Would you read that, please.

264 (The answer was read by the reporter.)

By Mr. Gregg:

Q. Doctor, that notation was made approximately a year after the accident and approximately a month to a month and a half after the operative surgery that you performed in August, was it not? A. Yes.

Q. And you referred to the return of function, you mean that the thumb, the functional use of the thumb had returned? A. This means to me that it is grossly satisfactory for the scars, the incision and the conditions at that time. My note in here, when I say return of function satisfactory, is not an evaluation of ability or disability but only in relationship to the scar and the incision itself. In other words, I am satisfied with the progress so far.

Q. You are satisfied that the operation that you performed—A. Was progressing okay.

Q. And you had achieved a good result? A. At this point I had achieved as good a result as I felt possible, yes.

(Referring to notes:) This is dictated but it hasn't been typed on yet.

265 Q. Doctor, would you read the notation, reference April 27, 1964? A. April 27, 1964, pain still persists, only now not just with stretching and pressure over the digital nerve but also at rest at times. There seems to be full range of motion but limited in strength and by pain. There is hypesthesia over the medial aspect of the thumb but not complete loss. Do not recommend transection of nerve—this means I do not. And referred to neurologist for evaluation.

Q. That was in April of 1964? A. That is right.

Q. What is your next notation? A. May 27, 1964.

Q. That isn't pertinent to this case, is it Doctor? A. No,

it is not. Miss Stull consulted me for other things than this case, too.

Q. What is your next notation? A. July 28, 1964. There is a note here written in hand by my secretary which stated—

Mr. Cramer: Objection, objection.

Mr. Gregg: That is not pertinent, is it, Doctor?

The Court: Very well, the objection is sustained.

Mr. Gregg: We agree it is not pertinent.

266 By Mr. Gregg:

Q. Would you turn your page, Doctor, what is the reference date of that notation? A. August 13, 1965.

Q. Just a few months ago? A. That is right.

Q. And what is your notation that you made following that visit? A. Chief complaint at this time again indicates that following a day's work, she still has pain and aching sensation in that left thumb.

Q. Doctor, hold it just a minute. That notation says that following a day's work, she still has pain. Is that the way it reads? A. That is the way it reads.

Q. All right, go ahead. A. Pain and aching sensation in that left thumb. And she was suspicious that possibly another tumor (neuroma) was forming. On examination there was no evidence of any neuroma at this time. However, there is still very little subcutaneous tissue over the digital nerve in this area and pressure on this digital nerve still causes a great deal of discomfort. She was

267 instructed that her lifting of heavy things and dropping them was due to the fact that she had to increase her grasp, thereby pressing whatever she was lifting against this nerve causing her the pain causing her to drop it. She was advised in these situations to wear some padding over this area. Actually, the scars here are healed very well and they were soft and not causing a particular problem. The cosmetic result is rather excellent. There was a problem in that she has

upon touching this thumb and that is the reason she stuck it up in the air when she typed.

The Court: Well, what I understood her to say was that it puts a strain on her wrist and creates a pain, that is what I have in my notes.

Mr. Carr: That is true, that is when she cocked her thumb up in the air, that did create a strain on her thumb and created pain. My recollection is that she testified that whenever she touched this thumb, it caused pain.

The Court: What is your recollection?

Mr. Cramer: My recollection, Your Honor, was that certain areas of touching the thumb did cause a sharp pain, she testified certain areas of touching the thumb caused it. And I believe, Your Honor, she demonstrated
271 further down, rather than the tip of it.

Mr. Carr: Your Honor, we won't pursue this, because apparently it has been limited substantially. Now we are not told that it is painful when she strikes the space bar, so we will go to the point the doctor is referring to now.

The Witness: I did not say it was not painful when she strikes the space bar.

Mr. Carr: I know you didn't, Doctor.

The Court: All I am talking about is what I understood her to say. I may be in error, that is the reason why I am asking what your recollection is. Mr. Carr has given me his.

Mr. Cramer: I thought, Your Honor, that she testified that a striking of the thumb in certain ways would cause pain. I don't wish to be technical about this case in any aspect.

The Court: You go ahead and put your question.

By Mr. Carr:

Q. The purpose of my question, Doctor, is to limit this area of deep pressure pain and you have limited it to that

point, is that right? A. This is the area limited to the acute pain that I described.

Q. Now, is this the area that you also suggested
272 she cover with some sort of adhesive band-aid to give a little protection from heat and from possible thumping? A. I said—well, I won't look at my records.

No, I said to pad the entire area, I just said wear a padding over the base of the thumb. I didn't specifically confine it to that one little spot. I said padding and the kind I put on her covered actually the area from that spot and around in the web between the first finger and the thumb and carried it down over the muscle of the thumb as well. There was also the complaint of pain over the muscle, the deep aching pain.

Q. Would it be right to say in effect that if she had an elongated band-aid that would go over the web of the thumb, that would be the type of band-aid that we might have in mind? A. Yes, but a little bit of a thicker padding than a band-aid.

Q. The padding, though, is not required at the top? A. Not on the tip, no.

Q. Now, you can correct me on this, when I pick something up, Doctor, and I hold it like that, assuming that to be a book or piece of paper, I ordinarily hold it between my first finger and that part of my thumb, is that right, is
273 that a normal holding position? A. For small objects, yes.

Q. All right. A. You pick up a pitcher around the neck.

Q. That's true, there are certain objects I have to use my entire thumb, that is correct. But how about holding a shorthand notebook? A. How do you hold a shorthand notebook?

Q. I am looking for one. A. I mean Miss Stull.

Q. Let's assume I am Mr. Carr, not Miss Stull, is that a normal way to hold a book? A. If that is your normal way.

Q. You hold it. A. For writing or in what manner?

Q. Hand it to me, that would be adequate. Isn't it true—you are the expert on thumbs at the moment, I am the lawyer—isn't that a normal way for a person to utilize the thumb to hold a piece of paper or a notebook?

A. That is right, that is the opposition I spoke about, right.

Q. Mr. Gregg spent a lot of time discussing this 24 hours worth of pain and possibly that was overdone, but

I want to ask you, in recollection of your notes
274 and your own memory, were you ever advised that this was a persistent, constant pain, all the time, all waking hours, all working hours? A. I was advised that this was a constant pain enough to wake her up at night. As I stated before, I was never advised, as I said, that it was a 24 hour a day pain.

Q. That is not what I asked you, Doctor, I said waking hours, constant pain in waking hours? A. I was told that, yes.

Q. Were you told that as recently as Friday of last week? A. Yes, I was.

Q. However, in your report of October, you state that she was unable to grasp large objects and was also limited in strength and maintaining her grasp on heavy objects. Now, assuming, Doctor, that it was your knowledge at that time that she was in constant pain all her waking hours, did you think that was an important enough item to include in this report? A. The constant pain also varies in intensity.

Q. From what to what? A. As I pointed out, this report was concerning her disability as well, with reference to handling and using that hand. My report was directed towards setting out that type of disability, not the amount of headaches and not the amount of discomfort and not
275 the amount of mental unrest that a constant pain would cause. This report was only directed towards that hand.

Q. Isn't it true that in arriving at disability, you equated disability and pain? A. On use of the hand, yes.

Q. So pain is important in deciding disability, is it not? A. It is from the standpoint of using it. But I did not include on here the fact that it woke her up at night, for instance.

Q. In other words, when you say the thumb has a 17% functional disability, is it right to assume it has an 83% normal function?

Mr. Cramer: I don't understand the question.

Mr. Carr: That is the balance of 17 from 100.

The Witness: These are a combination of the values. They come to 17%, it is arrived at by taking—

By Mr. Carr:

Q. You told us how it was arrived at. I wish you would direct yourself just to my question. A. I wish you would read my report because it is explained there.

Q. I am going on to the 25% later, I am dealing
276 with the 17% now. Am I right in saying—A. This
is a total estimated functional loss of the thumb
only, which means obviously if you lost 17 then you'd have
the 83 left, yes.

Q. But when you arrived at the 17%, did you take pain into consideration? A. No.

Q. When you arrived at the 25% functional disability of the hand, do you take pain into consideration? A. Yes.

Q. I am not talking about the pain you described as a headache now and then, I am talking about pain on the use of this hand. A. Yes, that pain I will include, yes.

Q. But you did not include and did not consider necessary to include in your report. Another thing, Doctor, you refer to February 18, 1964, the last sentence, no, the last paragraph: Motion limitation appears to be due to the pain and I feel full activity without pain will only be obtained by severing the nerve. The resultant loss of sensation on one side of the thumb would be less of a disability than present persistent pain.

Now, in answer to Mr. Gregg's question, two questions, at one time you said it would now be more of a disability and you said that you changed this opinion in April of 1964, one month after this letter was written. Was this on the basis of sending her to another doctor? A. I lost you, excuse me.

Q. The earlier letter of February 18, 1964, do you have that? A. I have got that.

Q. The last paragraph, fourth line: Motion limitation appears to be due to the pain. A. Yes, I have got that.

Q. Now, on February 18, 1964, it apparently was your opinion that if the nerve were severed, that pain would disappear and she would be left with a numb sensation which you considered to be less of a disability than persistent pain. Now, in answer to a question by Mr. Gregg, in April of that same year, two months later, you changed this feeling and said just to the contrary. Was this change based— A. No, this was not based on anybody's opinion. It was my own opinion and basically from the standpoint that the chief complaints at that time of pain seemed to be quite severe. By April 27, 1964, although the pain was just as severe, she was getting a good deal of her
278 feeling back in that thumb and I felt that it would be better not to go and cut the nerve and give her another problem. I just changed my mind at that point.

Q. The other problem is hypesthesia, loss of sensation, numbness? A. Yes, it was mild but it wasn't much and I felt that she should be sent to a neurologist at that time.

Q. Doctor, you saw her in April of last year, you saw her in August, October and November of this year. Now, during that period of time from April 1964 to November of this year, has she gotten persistently worse? A. I'd say from April 1964, I felt that she was getting worse, yes.

Q. And to date? A. Yes, but that doesn't imply nothing happened up to 1964, either.

Q. No, I am taking those two dates in mind, in other words in the last year and a half you say she has gotten

worse? A. Yes, particularly with reference to the more continual pain.

Q. But still you changed your diagnosis that you could remove this pain by severing the nerve and leave
279 nothing but a numbness? A. From the standpoint of function, that is correct.

Q. And you have equated pain and disability to arrive at this 25% disability in the hand? A. That is right.

Q. And if you remove the pain portion of that, what would be the disability of the hand? A. I'd have to figure it out.

Mr. Carr: I have no further questions.

The Witness: Because your sensation, as far as your figuring that disability out, is referred in a different manner.

Redirect Examination

By Mr. Cramer:

Q. There is a 25% total functional loss of the left hand, is there not, Doctor? A. Right now, yes.

Mr. Cramer: I have nothing further, Your Honor.

The Court: Is it agreeable to everyone now for the doctor to be excused?

Mr. Gregg: Yes, Your Honor.

Mr. Carr: Yes, Your Honor.

Mr. Cramer: Yes, Your Honor.

The Court: You are excused, Doctor.

280 The Witness: Thank you.

(Witness excused.)

The Court: At this time we will take a recess for five minutes.

(A short recess was taken.)

Mr. Cramer: May it please the Court, the plaintiff's witnesses are now concluded and I would like to introduce into evidence certain statutes we would like the Court to

take judicial notice of, one, I would like to introduce into evidence the mortality tables from the Department of Health, Education and Welfare.

The Court: Have you shown that to the others?

Mr. Cramer: No, Your Honor.

(The exhibit was handed to other counsel.)

Mr. Carr: No objection, Your Honor.

Mr. Cramer: This shows that the plaintiff being aged, she is in the category of age 20 to 25, according to the Health, Education and Welfare mortality table, she has a life expectance of 55.5 years. This has been used as an exhibit many times before, it is from the library, Your Honor.

The Court: Very well.

The Clerk: Plaintiff's Exhibit No. 6 for identification.

The Court: Admitted.

281 Mr. Cramer: Thank you, Your Honor.

The Clerk: Plaintiff's Exhibit No. 6 received.

(Mortality table was marked Plaintiff's Exhibit No. 6 for identification and received in evidence.)

Mr. Cramer: The Inland Rules of the Road, promulgated by the United States Coast Guard, have been stipulated. There are also federal statutes which the Court can take notice of, the first statute on which we place reliance is 46 United States Code annotated, Section 526, small letter "l", which provides that: No person shall operate any motor boat or any vessel in a reckless or negligent manner so as to endanger the life, limb or property of any person.

Would Your Honor like to see that?

The Court: No, I have a copy.

Mr. Carr: I would like to ask a question, Your Honor. Is that the motorboat act of 1940?

Mr. Cramer: That is the Federal Motorboat Act.

Mr. Carr: Would Your Honor also note 179 Federal Supplement 135?

The Court: 179 Federal Supplement?

Mr. Carr: 135, where the Court, referring to the act, said: They, the act, merely provide certain standards
282 to be complied with by those who operate certain types of motorboats and penal sanctions to be imposed on such operators for violating the same, and the Court goes on to say they confer no right of action for damages in favor of any individual suffering personal injury as a result of violation of the various safety provisions.

I think they'd have to be read in conjunction with possibly this precedent.

Mr. Gregg: Under those circumstances, Your Honor, I would object to that particular Code provision being offered or being considered by the Court in this case, since it is designed solely to establish penal sanctions and not to provide a basis for—

The Court: I thought it was being offered as you would offer, for example, a traffic regulation.

Mr. Gregg: I think that from the reading that was just given to us by counsel that you can see that it does not purport to establish standards. It purports and appears to be solely a basis for invoking criminal sanctions against a person who is guilty of this particular act, not a basis for establishing civil liability. In other words, it doesn't purport to establish any standards and it merely
283 gives the government the right to criminally prosecute people who are guilty of this type of behavior.

The Court: Aren't you all agreed upon what the standard of care is?

Mr. Gregg: Reasonable care, Your Honor.

Mr. Cramer: Yes.

The Court: Well, yes.

Mr. Cramer: Another section of the United States Code, Your Honor, United States Code annotated, Title 33, Section 221, which is the Inland Rules of the Road which are stipulated to, provides: Nothing in these rules shall exon-

erate any vessel or the owner or master or crew thereof from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper lookout or the neglect of any precaution which may be required by the ordinary practice of seamen or by special circumstances of the case.

That, Your Honor, was applied in *Stevens v. United States Line*, 187 Federal 2d 670, by the Court in a case involving a collision between two speedboats, Your Honor, two motorboats.

The Court: You said 187 Federal what?

Mr. Cramer: Federal 2d, Your Honor, 670, that was the Fifth Circuit, Your Honor.

I also would like to read into evidence under Rule 26 of the Federal Rules of Civil Procedure certain portions of the defendants' depositions, Your Honor.

Referring, Your Honor, to page 25 of Defendant Long's deposition, beginning on line 17 thereof:

"Nothing happened on my boat. On his boat—The boat seemed—It jumped across a small—a wake. It might have been a foot high or it might have been smaller. And when the boat went across the wake it seemed to sort of—Well, what it sort—It just seemed to go out of control in the back end when it hit this wake. Like it air borned. It hit the wake and it looked like the boat air borned out of the water for just a minute."

Again, respectfully, referring the Court to Defendant Long's deposition, page 30 thereof, line 13, Defendant Long is answering and he is referring to Defendant Engle, what he observed:

"When he first went—made this out of control—It looked as though it was just out of control and it was in the trough of this wake and it was turning from the torque of the propeller I immediately made a right turn or started bearing right to avoid him from landing in my front seat."

That is Defendant Long stating that. Referring
285 the Court again to Defendant Long's deposition,
page 29 thereof, line 17, Defendant Long answers:

"The thing of it is the river is wide down there. A boat just a half a mile in front of you and you are just catching his wake and the river, as I said before, was full of boats between—It seemed like when we had the accident, when he hit me there was 15 boats on the spot before people were even fished out of the water. It just seemed like they come from nowhere."

Page 12, Your Honor, of Defendant Long's deposition, beginning at line No. 5, Your Honor:

"Q. How many hours would you say that boat had been operated with that Crusader Engine in it?"

This is referring to Long's boat and the new engine.

"A. Approximately ten hours."

Mr. Gregg: Your Honor, these portions have already been read into evidence on Friday and this part here was read to the Court this morning for the purpose of asking the expert a hypothetical question.

The Court: Nothing was read this morning, I don't think.

Mr. Gregg: This part here was, about the number
286 of hours on the boat.

The Court: Yes, I believe it was.

Mr. Cramer: This will take only a moment, Your Honor.

The Court: All right, go ahead.

Mr. Cramer: All right, thank you, Your Honor.

"Q. How many hours would you say that boat had been operated with that Crusader Engine in it?"

"A. Approximately ten hours.

"Q. How many hours would you say that boat had been operated?"

"A. Approximately ten hours. May have been less. I took the boat out and tried it out to make sure it was run-

ning properly and we changed a few propellers on it to see what performance we could get out of the engine.

"Q. Now, of the ten hours that boat had been operated with this Crusader Engine in it before the day of the accident, can you tell me, as well as you can remember, how much of that ten hours you had been in the boat?"

Asking Mr. Long how many of the ten hours he had been in the boat:

"A. Probably all of—Probably 8 hours.

287 "Q. And during that 8 hours was Mr. Engle in the boat with you or was he in the boat part of the time?

"A. He was in the boat, I believe—I believe he went with us for a couple of what we call a shake down run."

That is Defendant Long stating that.

And Defendant Long's deposition, page 16 which has not been read this morning, lines 11 through 16, referring to this 8 hours again:

"Q. During the 8 hours or so you had been on the boat, how high had you been able to get the RPM's up on this Crusader Engine?"

Referring again to the engine in Mr. Engle's boat.

"A. Well, for, I would say, approximately 6 hours we didn't have a Tachometer on it, because I was waiting for parts for a Tach Cable.

"Q. After you had gotten your Tachometer, can you tell me what the maximum RPM's were that you had operated this?"

I don't think the rest is relevant to what I want to bring out now.

288 Just one more portion of the transcript, respectfully referring the Court to Defendant Engle's deposition, page 15, line 9, Your Honor, this is Defendant Engle:

"A. I am saying I do not know what caused the accident. I do know what happened to create the accident.

"Q. Describe what happened then.

"A. Going down the river my boat swerved sharply to my right and went out of control and a collision took place seconds afterwards and I found myself in the water.

"Q. Now, before your boat veered sharply to the right, approximately how fast were you going?

"A. About 30. Between 30 and 35 miles an hour.

"Q. The other boat that you collided with, that was the boat owned by Tom Long, is that correct?

"A. Yes.

"Q. Approximately what was his speed at the time?

"A. Approximately the same speed."

May it please the Court, I would also like to make a motion to amend the pretrial statement to include *res ipsa loquitur* as part of our case. We feel we have shown
239 negligence, at least sufficient negligence to pass the case on to the defendant, so to speak. However, I also ask *res ipsa* perhaps as a super-precautionary measure, that *res ipsa loquitur* be allowed us.

Your Honor, I have read the cases on this subject, I have not included in my pretrial statement, due solely to inadvertence, the words that we rely on *res ipsa loquitur*. But when I framed the complaint, Your Honor, I went to the pleading books and framed that complaint according to the way *res ipsa loquitur*, from my understanding, was to be framed. I alleged specific negligence, then I alleged general negligence, and then I put in a special paragraph, paragraph No. 4, that the cause of the accident was that the instrumentality was under Defendant Engle's exclusive control and management, and thus by making the complaint so, the defendants were apprised of the fact that I intended to use *res ipsa loquitur*. Also, at the opening statement, I again mentioned *res ipsa loquitur* as an auxiliary or a supplementary measure.

I respectfully refer the Court to the case of *Johnson v. Geffen*, 111 U.S. Appeals D. C. 1, which is in 1960, by our Court of Appeals. I refer to the statement that on a motion for directed verdict, plaintiff's pretrial statement should be read in a light which is favorable to the plaintiff.

Under the *Meadowgold* case, where a pretrial statement was not allowed to be amended, the Court specifically noted that the plaintiff in his complaint did not ask for *res ipsa loquitur*, didn't ask for it at pretrial and didn't request it when the case started, but that is opposite to the position here where we made it specifically known in the complaint and at the beginning of the trial.

In any event, Your Honor, I respectfully submit the plaintiff has proved negligence.

Mr. Carr: Your Honor, is this being directed to Defendant Long?

Mr. Cramer: If your Honor wants me to answer that—

The Court: Yes, I think you should answer it.

Mr. Cramer: Your Honor, perhaps I could best explain it briefly by saying—

The Court: He wants an answer to his question.

Mr. Cramer: I think we have proven specific negligence as to the Defendant Engle. When I originally filed the case, Your Honor, I did not sue the Defendant Long. Defendant Long was brought in as a third-party defendant and therefore, of course, I had to join him because if this Court found that Defendant Long was negligent, too, Miss Stull would be out in the cold because we wouldn't have privity of suit, so I amended also to include Defendant Long.

291 As to Defendant Long, I would think that *res ipsa loquitur* is applicable. I must honestly say to the Court that as to Defendant Long, certainly negligence proved against him is not good.

The Court: What did you say?

Mr. Cramer: Negligence against Defendant Long would not be considered great or perhaps I should say it another

way, I don't think we have proven much of a case against Defendant Long, frankly, Your Honor, but as to Defendant Engle, I think we have specifically proven it.

Mr. Carr: I am still not sure what the answer was. Is the res ipsa made against us or being abandoned?

Mr. Cramer: No, we maintain a res ipsa claim against Defendant Long.

The Court: It is 3:30, it is about time to adjourn now. Do you all want to be heard tonight or tomorrow?

Mr. Gregg: I think, Your Honor, in view of one of my objections that maybe you could hear me out.

The Court: Very well.

Mr. Gregg: One of my objections is, of course, that this is a new element just injected into the case at this time.

One of the reasons that cases are tried according to the pretrial order and the complaint is to give the other
292 party an opportunity to be prepared to meet the issues that are going to be raised at the trial. I have had no opportunity to research the question of the applicability of res ipsa loquitur. I am not what I would say fully prepared even to argue a motion against it except by saying, Your Honor, that it is coming to me as a complete surprise at this stage of the proceeding. Counsel says that he alleged a case of res ipsa loquitur.

The Court: In paragraph 3, he does say the defendant, this is the Defendant Engle, had exclusive control and management of his aforementioned motorboat.

Mr. Gregg: That is not quite the same thing as saying that he is relying on res ipsa loquitur.

The Court: No, it is not the same, but—

Mr. Gregg: The amended complaint that is filed in this case says that at the time of the accident plaintiff was a passenger in Defendant Long's boat. Plaintiff avers that this accident was caused by the negligence of one defendant, the Defendant Engle, or the negligence of the Defendant Long, or the negligence of both of them, and requested that damages be awarded against him or both of them.

One of the elements of the application of *res ipsa loquitur* is that the defendant against whom this doctrine is
 293 pled was negligent and that this is the only reasonable inference that can be drawn from the evidence. Furthermore, a plaintiff by relying upon *res ipsa loquitur* has the affirmative burden of excluding all other causes in the negligence of that particular defendant.

In this case, the plaintiff has specifically alleged specific acts of negligence against another party and, by the very nature of the doctrine, is not entitled to rely upon it at this time.

The Court: Do you want to say anything, Mr. Carr?

Mr. Carr: No, Your Honor, I am just going to enter a formal objection to it. I don't want to discuss it at this hour, no.

Mr. Cramer: May I say one thing?

The Court: Yes.

Mr. Cramer: Mr. Gregg states that he is completely surprised today. However, on the opening of the trial, he said: Your Honor, they have abandoned their request for *res ipsa loquitur* because it is not in the pretrial statement. So apparently he knew about it on Friday.

Thank you, Your Honor.

The Court: We are going to recess now until 10 a'clock tomorrow.

(Court adjourned at 3:40 p.m. to resume tomorrow, November 16, 1965, at 10 a.m.)

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PROCEEDINGS

Mr. Cramer: Good morning, Your Honor.

The Court: Good morning.

Mr. Cramer: I was at the point of the trial where I was introducing certain matters into evidence and also I had made a motion to amend the pretrial statement. I would like to introduce one more matter in evidence which

will only take a moment, it is from the deposition of Defendant Robert I. Engle, it is page 28 thereof.

(Mr. Carr conferred with Mr. Cramer.)

Mr. Carr: Your Honor, I asked whether or not he minded my next witness being present while he was making this presentation and he said he did not.

The Court: You do not?

Mr. Cramer: No, ma'am.

The Court: All right. Very well, page 28 in the deposition.

Mr. Cramer: Line 3, this is Mr. Engle answering a question:

"Any time on the Potomac, from my experiences on the water, any normal swell from any size craft can cause a boat, my boat to be put out of control. It doesn't
297 have to be a large wake. It can be just a normal wake coming from any other craft any other size."

Then, Your Honor, I believe that the other remaining matter is the motion to amend the pretrial statement.

The Court: Yes. Do you all want to say anything? You have been heard on that, haven't you?

Mr. Gregg: Yes, Your Honor.

Mr. Carr: I would like to say something, I didn't say it the other day. I oppose this as far as the defendant Long is concerned. The necessary quality to apply the doctrine of res ipsa, and I am reading from the case of Washington Loan and Trust Company v. Hickey at 78 United States Appeals D.C., page 59, actually page 61 in this case—

The Court: That is the case where something fell out of the window?

Mr. Carr: A ventilator, yes, an air conditioner fell out of the window, and it says the principle in question is simply that when the cause of the accident is, one, known, and two, in the defendant's control, and three, unlikely to do harm unless a person in control is negligent, the defendant's negligence may be inferred without additional

evidence. Your Honor, this particular case here, the whole case has been directed to the operation of the Engle
298 craft and the fact that it apparently lost control and came over and came in contact with the Long boat. I believe that there is no question that Long had any control whatsoever over the Engle craft, so I think the center here is missing, shall we say, of two necessary propositions. I do not think that any *res ipsa* can apply against Long because he had absolutely no control over the instrumentality that went out of control and caused the accident.

The Court: I noticed there have been some cases where two trains collided and they permitted this doctrine, but of course I suppose that each one was using the same track.

Mr. Carr: We also have a problem, *res ipsa* in the field of buses, trains and cabs, has become pretty much tied in with the high degree of care, and it is almost impossible to separate the two. However, here we only have a reasonable care problem and I don't think that—we do find cases in buses, frequently, where they, I won't say confuse the two doctrines but they are so related that it is practically impossible to separate them. However, here we have just a reasonable care involved and I don't think that *res ipsa* applies to the Defendant Long.

The Court: Ordinarily, where this *res ipsa* principle is permitted, while the plaintiff still has the burden of
299 proof, the defendants have the burden of going forward once the circumstances have been established by the evidence, that is, the circumstances of the collision or whatever the act is that allegedly caused the damage. But here this application has been made late and I am going to deny it.

Mr. Cramer: As to both defendants, Your Honor?

The Court: Yes.

Mr. Cramer: The plaintiff rests its case, Your Honor.

The Court: Very well. The defendants may now proceed.

Mr. Carr: Will you call Mr. Hildebrand to the stand, please.

Thereupon—

Earl M. Hildebrand

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination

Mr. Carr: Your Honor, Mr. Hildebrand is being called as an expert witness. I know that it is usual to call the parties involved first, but scheduling being what it is, we find it necessary to, in effect, put him on out of turn, with your permission.

The Court: Very well.

300 By Mr. Carr:

Q. Will you please state your full name and address?

A. Earl M. Hildebrand, 8517 Virginia Avenue, Annandale, Virginia.

Q. What is your occupation? A. Manager of William J. Little, Inc.

Q. What kind of business is the Little Company involved in? A. Dealer in boats, engines, and marine accessories.

Q. How long have you been with them? A. With them since '54.

Q. How long have you been with the boat sale and boat repair business and boats in general? A. Since 1928.

Q. Have you had any experience in the selling and dealing in motorboats and inboard and outboard motors? A. Since that time, Yes.

Q. Have you had any experience with Chris-Craft products? A. I have been dealing with Chris-Craft since '28.

Q. Since '28? A. Since '28.

Q. Have you had any personal experience in motorboating? A. Well, quite a little bit. I have handled all
301 sizes that they build; I race boats, for a number of years, and serviced them, sold them.

Q. Is there any particular association that deals with motorboats and motorboat racing? A. The American Powerboat Association handles all of that.

Q. Have you been involved with the American Powerboat Association for any period of time? A. For a number of years, I have been a member, I have been on the safety council and on different committees of the association.

Q. Did you do any racing when you were with the powerboat association? A. Yes, I raced for a number of years.

Q. How many years would you say that was? A. A total of about 15 years.

Q. Have you operated powerboats on the Potomac River? A. Yes, I have.

Q. Approximately how many years would you say you did this? A. Since we first opened a business in Washington, 1936.

Mr. Carr: Your Honor, I suggest that this witness is qualified to speak about powerboating on the
302 Potomac River as well as about the Chris-Craft products that he dealt with since 1928.

The Court: Very well, the Court will so rule.

By Mr. Carr:

Q. Mr. Hildebrand, I have here what is supposed to be a portion of the Potomac River and these are the two boats that we are dealing with in this particular case. The evidence has shown this to be a 1956 Coronado, Century Coronado boat, with 250 horsepower motor, 20 foot long and approximately 7 foot wide. This particular drawing or particular diagram is to the scale of one half inch to a foot; in other words, this boat here is 10 foot-10 inches long to represent a 20 foot boat.

Testimony also has been presented that another boat, owned and operated by Defendant Engle, was 100 foot to the left of that Century Coronado and approximately 50 foot in front. This boat here is a 1953 Chris-Craft, mistakenly named Capri, apparently a different series, actually. At the time the accident occurred in 1962, it had a 230 horsepower Crusader Marine Engine in it. This, incidentally, is the scale, the distance between the two boats, they are 50 inches apart and 25 inches ahead, to show the 100 feet and the 50 feet.

Before asking you about the accident itself, I would like to ask you a few questions about the boats and their power plants. Directing your attention to the Century Coronado and its 250 horsepower Crusader Marine Engine, was that the stock engine for that particular boat? A. As far as I know, that is the stock engine for that boat, yes.

Q. Who manufactures that engine? A. That engine is manufactured by Detroit by Cornell, sold as the Crusader.

Q. Does Crusader manufacture it or is that a trade name? A. That is the trade name of that engine, they buy a base engine and build it up for marine use from there.

Q. What is the base engine on this particular 250 horsepower engine? A. That is a Cadillac engine.

Q. Is it a V-8 or six cylinder? A. V-8.

Q. Directing your attention to the 1953 Chris-Craft, what type of engine did that boat originally come with? A. Well, that boat, they had the choice of three, Model K, K1, KLC and KBL.

Q. Slow down a little.

The Reporter: What was the last one?

The Witness: KBL.

304 The Reporter: Just a minute. They had the choice of three models?

The Witness: I beg your pardon, it is four.

By Mr. Carr:

Q. What does this mean from a horsepower viewpoint?

A. From 95 to 131.

Q. What type of engine were they, straight sixes or V-8?

A. They were straight sixes.

Q. Are these engines still being placed in Chris-Craft boats today? A. They are discontinued engines, they are no longer available.

Q. Now, as I have indicated, the boat was remodeled and a new engine placed in it. At this time, it was 231 horsepower Crusader Marine, 327 cubic inch engine. Who makes that? A. That was made by Cornell, the same manufacturer of the other engine.

Q. Is it the same type of engine that was in the Century Coronado? A. No, it is a much smaller engine, it is a little engine from a Chevrolet block.

Q. In other words, the Century Coronado has a 305 Cadillac block and this has a Chevrolet block? A. Correct.

Q. The engine manufacturers, they buy the blocks from General Motors, is that it, and then build the engine on top of it? A. That is correct.

Q. What is the approximate difference in weight between the old Chris-Craft 131 horsepower and the new Crusader Marine 230 horsepower, I think it is? A. Well, I don't know the exact weight on the Chris-Craft, that is about five to 660 pounds. The other engine weighs approximately 780 pounds, plus or minus 50 pounds.

Q. In the field of boat engines and boat remodeling, are engines and boats frequently changed? A. Yes, they are.

Q. I know that we think of a 1953 boat and maybe try equating that with a 1953 car, and a car is infrequently changed, but in boats you say they are changed? A. They are changed as time goes on, not as frequent as automobiles.

Q. We have testimony here that the original engine apparently was replaced with this new 230 horsepower

engine in this 18 foot boat. In your opinion, was this too much engine for this boat? A. No, in my opinion, it would not be, for that 18 foot boat.

Q. What would be the weight differential between the 131 horsepower engine and the 230 horsepower? A. Approximately 140-145 pounds.

Q. Would this radically change the handling characteristics of the 18 foot Chris-Craft? A. It should not make any difference, very little, if any.

Mr. Carr: Would you mark this as Defendant Long's Exhibit No. 2 for identification, please.

The Clerk: Defendant's Long's Exhibit No. 2 for identification.

(Crusader Marine pamphlet was marked Defendant's Long's Exhibit No. 2 for identification.)

By Mr. Carr:

Q. I show you what has been marked as Defendant Long's Exhibit No. 2 for identification and ask you if you identify that? A. Yes.

Q. What is that? A. That is a Crusader Marine Engine.

Q. I direct you now to the second page and ask you what that shows there? A. That shows a Crusader Model 230 with 327 cubic inch engine.

Q. Is that the type of engine that we have been discussing here today that was put in the 18 foot Chris-Craft? A. That is correct.

Mr. Cramer: Is this the new engine that was installed, is that right?

Mr. Carr: Yes.

Mr. Cramer: I have no objection, Your Honor.

Mr. Carr: May this be offered in evidence, Your Honor?

The Court: Yes, admitted.

The Clerk: Defendant Long's Exhibit No. 2 received.

(Defendant Long's Exhibit No. 2 was received in evidence.)

By Mr. Carr:

Q. Mr. Hildebrand, I am going to ask you what is known as a hypothetical question, stating certain facts that have already been placed in evidence, and ask you certain questions based on these facts. Assuming that we have two powerboats which we have already described for you, the 1956 Century Coronado and the 1953 Chris-Craft, traveling south on the Potomac River somewhere approximately a mile south of Marshall Hall, going south; the Century Coronado is powered with a 250 horsepower engine, it has seven people in it including the operator; the 1953 Chris-Craft is powered with a 230

horsepower engine, it has three people in it including the operator; the boats are proceeding on a parallel course and have been for some indeterminate period of time; they are traveling at approximately the same speed which has been estimated as between 30 and 35 miles per hour; the Chris-Craft is traveling about 50 feet ahead and 100 feet to the left side of the Century Coronado; the weather is clear, there is a slight wind and a slight chop to the water estimated between four to six inches; there are other boats in the area, in the radius of a half mile or so, about ten to fifteen boats.

Mr. Cramer: Excuse me, Your Honor, as to the four to six inches, I have never heard that testimony as of yet. A slight chop on the water, I remember, but not four to six inches, I don't remember reading that.

Mr. Carr: That is not important, I will make it a slight chop.

By Mr. Carr:

Q. There is a slight chop on the water and there is a slight wind; the Chris-Craft motorboat make an unexpected and unexplained right angle turn, apparently going out of control and actually turning over and eventually comes in contact with the left side of the Century Coronado which has attempted to swerve to its right, but still contact was made.

Now, assuming those facts to be true, point No. 1, were these boats traveling at a cruising speed? A. Speed within reason, yes.

Q. Were they traveling at their maximum speed based on the motor power that they have? A. No, they were not.

Q. Are there any rules of the road that either was violating, as far as you can determine? A. I can see no violation of any rules there.

Q. Was this boat here in dangerous proximity to that boat, prior to the problem arising? A. At that distance, I can see where it would have no interference with the other one.

Q. Were either of the boats overpowered, as far as their engine plants were concerned? A. I wouldn't say they were, no.

The Court: What distance did you consider that the boats were from each other?

The Witness: He said 100 feet apart and 50 feet behind.

By Mr. Carr:

310 Q. Considering the power of the boats, the slight chop to the water and the weather, in your opinion were these boats traveling too fast? A. Not with a slight chop, no.

Mr. Carr: I have no further questions, Your Honor.

Cross-Examination

By Mr. Cramer:

Q. Mr. Hildebrand, you say that the engine, the 230 horsepower which was in Mr. Engle's boat was not too much engine for the boat? A. I would say not.

Q. Doesn't this, to a great extent, depend upon the experience of the operator? A. No, a boat overpowered would be dangerous to any operator.

Q. I see. Well, if the boat has 100 horsepower, it is less dangerous in the hands of an inexperienced operator

than a boat that has 300 horsepower, is it not? A. It could be, at certain speeds, yes.

Q. Now, you state that 30 to 35 miles per hour was within reasonable speed? A. That is correct.

Q. Does not reasonable speed depend upon the
311 circumstances which the boat is in? A. Yes.

Q. Now, if there are 15 boats, approximately 15 boats on the Potomac River, many of them cabin cruisers which of course are larger, and these boats are within a block to two blocks radius of the two boats, these 15 boats would be leaving wakes, would they not? A. Yes, they would be.

Q. All right. Now, should not an operator driving on the river under those conditions be on the lookout for wakes? A. I think he should, if it is a dangerous wake.

Q. All right. A dangerous wake would be any wake that can cause a boat to capsize, would it not? A. That is true.

Q. And go out of control? A. That is true.

Q. And so if there are 15 boats within a radius of a block or two blocks, many of these boats larger and they are causing wakes, then the operators of the boats should take precautions as concerns these wakes, should they not? A. Correct.

Q. One of the precautions might be driving at a reduced speed in consideration of the conditions, isn't that correct?

A. That is correct.

312 Q. I thank you. Now, I'd like to go on to another portion of it, Mr. Hildebrand. As regards the changing of the engine in the boat, does not this change the handling characteristics of the boat? A. In that particular boat, it would not; the boat is so designed that it would handle that engine perfectly.

Q. Mr. Hildebrand, when a new engine is put in a boat, doesn't the company or the boat operator or someone change the steering on the boat? A. Not necessarily, if the steering manufactured in the boat is correct for that model boat.

Q. Now, in considering the chine line along the side of this particular boat, considering the original steering, should the steering have been changed at all when the new motor was put in, would you have recommended it? A. I don't understand just what part of the steering you are referring to.

Q. Any part of the steering? A. No, there would be no need for any change in steering in a boat because of change of power.

Mr. Cramer: Thank you very much.

313 Redirect Examination

By Mr. Carr:

Q. Mr. Hildebrand, I believe you testified since 1936 you have been actively boating in the Potomac River, is that true? A. Off and on, my business keeps me from driving a boat but so often, but I do have boats of all sizes up and down the river.

Q. Would you say the Potomac River was a fairly active river as far as boating is concerned? A. Very active in the summer months.

Q. Isn't it also true that as a result of this that there are practically wakes constantly in this river? A. That is correct.

Q. Now, when you said an unusual wake, what kind of a wake were you referring to? A. Well, an unusual wake would be a wake close to the stern of the boat making the wake, after it leaves it a distance it is of no more than a little chop, it becomes a chop on the sea.

Q. When you say close to the stern, how close would you say? A. Well, within a 100 feet of the boat.

314 Q. This is before the wake settles down and just becomes a ripple, in effect? A. There is a difference between a wake and a wave. A wake is made by a propeller and it pulls a hole at the stern of the boat making the wake and close to that boat, it could be a dangerous thing.

Q. And after it has dissolved out to a 100 feet— A. It settles out to waves.

Q. And the boats on the Potomac River here are constantly causing such a disturbance in the water as a wake, isn't that true? A. There's quite a little disturbance in there when there's a number of boats out.

Q. Is it a normal thing or an expected thing that a wake would cause an 18 foot Chris-Craft to go completely out of control and veer off sharply to its right? A. That doesn't happen often.

Mr. Carr: I have no further questions.

Recross-Examination

By Mr. Cramer:

Q. Mr. Hildebrand, however, if the operator of the boat states that any normal wake from any size craft can cause my boat to go out of control, doesn't it become a
315 little more probable that even a small wake can cause his boat to go out of control? A. It is doubtful that a small wake would cause either one of those boats, manufactured by those people, they are well-built boats.

Q. Mr. Hildebrand, if you were operating this boat, the Engle boat that went out of control, and your boat went out of control, went off course, what would you do? A. If it went out of control and went off course?

Q. Well, if it suddenly veered to the right, what steps would you take to bring the boat back under control? A. I would try to correct it in steering.

Q. Would you also try to throttle back? A. Well, naturally you would throttle back, yes, I would.

Q. And you would try to correct the steering? A. Correct.

Mr. Cramer: Thank you.

Mr. Gregg: I have just a few questions, Your Honor.

Recross-Examination

By Mr. Gregg:

Q. Mr. Hildebrand, I gather that wakes are an expected occurrence in a river that has boats going in both
316 directions on it? A. Correct.

Q. And the size of the wake depends upon the proximity of the boat creating it and the speed of the boat that is creating it, is that right? A. That is correct.

Q. And is it possible that a wake could be created by a boat suddenly starting out in the water? A. A boat starting out with full power would create more wake than after it is underway, yes, sir.

Q. And if a boat, in the area of other boats, starts out suddenly and creates a large wake, the operator of a boat that might be affected would have only a very short time in which to see it or to do anything, is that right? A. That could be, yes.

Q. Now, in your experience, has damage ever been caused by boats creating a wake? A. Oh, many, many times.

Q. And are boat operators expected to control their wake in the area of other boats? A. That is correct, that is an unwritten law that you try to control your wake to make it as safe as possible.

Q. For the other people in the area? A. For the other people involved.

317 Q. And that is so because the person creating the wake is the one who, in effect, is creating the dangerous condition that caused the damage? A. He is more or less liable for the damage.

Q. Now, in the event a boat is caught in a sudden wake that does cause it to go out of control, you stated, first of all, that doesn't happen very often? A. No, sir.

Q. I gather from your testimony that you would agree that it is a possibility that could occur? A. It is a possibility, yes, sir.

Q. And in the context of the questions asked of you by Mr. Carr, are there other possibilities inherent in that situation that could have created this emergency? A. Many things could have happened to cause the boat to go out of control.

Q. Would you tell us some of them? A. Well, you could have a mechanical failure in steering that you would lose control of the boat, you could hit a submerged object that would cause you to lose control.

Q. In other words, for example, in that last respect, suppose there were a log that was waterlogged and just
318 under the surface of the water? A. That would be one of the most dangerous things to run upon.

Q. And in your experience, are there submerged articles occasionally on the Potomac River? A. In the Potomac? Yes, there's many of them.

Q. Is it possible for an operator of a boat who is approaching a log or a waterlogged or submerged article to always see that article up ahead? A. Not always.

Q. In other words, it could be just far enough below the surface to create damage to the underpart of the boat but not be visible to the operator of a boat on the surface? A. That is correct.

Mr. Gregg: I have no further questions.

Mr. Cramer: I have one question.

Recross-Examination

By Mr. Cramer:

Q. Mr. Hildebrand, is it not very true that when an operator of a boat hits a submerged object such as a log mentioned by Mr. Gregg, he knows it in the sound? A. He should know when he runs upon a log.

Mr. Cramer: Thank you very much.

319 Recross-Examination

By Mr. Gregg:

Q. Mr. Hildebrand, you said he should know, but assume, for example, the log was far enough below the surface that

the only contact made was with the rudder? A. Then I'd have to say unless it broke the rudder or damaged the rudder, he should know if he hit it hard enough to capsize the boat.

Q. Now, in this particular case, you don't know whether the rudder was still on the boat, the Engle boat, when it was brought up to the surface sometime later? A. I have no way of knowing anything about the condition of the boat, no.

Q. If the rudder were not on the boat at that time when it was brought to the surface in the course of the salvage operations, would that be a significant factor to you? A. It would be reasonable that he had reason to lose control of the boat if he had no rudder when it was brought to the surface.

Mr. Gregg: I have no further questions.

Recross-Examination

By Mr. Cramer:

Q. Assume, please, Mr. Hildebrand, that the
320 Engle boat capsized, collided with this other boat,
that the Engle boat just about flipped, capsized, that
the propeller struck this lady, the Engle boat propeller
struck this lady, isn't it likely that the condition of the
boat would be heavily damaged as a result of the impact?
A. Just capsizing wouldn't have any effect on it. Now, the
colliding, I can't answer that.

Q. Capsizing and hitting another boat, I mean. A. I don't know the condition of the impact, so I would have no way of knowing.

Mr. Cramer: Thank you. I have nothing further.

Mr. Carr: I have nothing further.

The Court: You are excused, Mr. Hildebrand.

(Witness excused.)

Mr. Gregg: We would like to call Mr. Weiss.

The Court: I don't know how many witnesses you have,

but the Court doesn't expect to sit tomorrow afternoon, so you may make your plans.

Mr. Gregg: We have Mr. Weiss and the two parties, and I had Dr. Murphy on call to be here at noontime today, the neurologist who examined the plaintiff at our request. I hope he is here at 12 o'clock noon today, and they will be our only witnesses.

321 The Court: I am not sure that is such a good time for him, 12 noon?

Mr. Gregg: He had an office full of patients this morning and couldn't be here earlier and he is in surgery this afternoon and 12 then was just about the only time that I could get him.

The Court: When we take a recess this morning, I will look at my calendar. I have a luncheon engagement with Judge Leventhal and some other Judges about the Judicial Conference, I think it is at 12:30 but it might be 12:15. I will let you know as soon as possible.

Thereupon—

Jacob Frederick Weiss

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gregg:

Q. Would you state your full name, please, sir? A. Jacob Frederick Weiss, W-e-i-s-s.

Q. What is your address? A. 909 Clintwood Drive, Silver Spring.

Q. What is your occupation? A. Salesman.

322 Q. For whom? A. Joseph Guss & Sons.

Q. How old are you, sir? A. Twenty-six.

Q. Now, are you acquainted with Mr. Engle and Mr. Long, the defendants in this case? A. Yes, sir.

Q. How long have you known Mr. Engle, for example? A. About thirteen years.

Q. Did there come a time in August of 1962 when you were a passenger on his boat when it was involved in a collision on the Potomac River? A. Yes, sir.

Q. Do you recall what day of the week that was? A. I believe it was a Sunday.

Q. And do you recall what type of a day it was? A. Fairly nice August day.

The Court: Whose boat was it that you were a passenger on, Mr. Long or Mr. Engle?

The Witness: Mr. Engle's boat.

By Mr. Gregg:

Q. Where had you met Mr. Engle on the day of
323 this accident? A. I don't recall whether it was at the boat yard or at his restaurant.

Q. And what was the purpose of your meeting Mr. Engle on this particular day? A. We were going to go down river, I believe it was to Sweden's Point and have some crabs to eat.

Q. And had this been a prearranged location? A. I really don't recall.

Q. There did come a time when you did go down to the Long boat yard? A. Yes, sir.

Q. And did there come a time when you got on Mr. Engle's boat? A. Yes.

Q. And did there come a time when the boat left the dock? A. Yes.

Q. At that time, who was operating the boat? A. Mr. Engle.

Q. And who else was in the boat? A. A fellow by the name of Dave, I don't recall his last name.

Q. Can you describe Mr. Engle's boat for me, just
324 generally? A. It was about, I don't know how long it was, about 18 or 19 feet, Chris-Craft, inboard speedboat.

Q. And had you previously been a passenger on a boat operated by Mr. Engle? A. Yes.

Q. Were you familiar at that time with his qualifications for operating a boat? A. Yes.

Q. Now, at the time that you left the dock, did another boat join you? A. Yes.

Q. Whose boat was that? A. Mr. Long.

Q. And what was the arrangement, as far as you understood, with respect to the Long boat? A. I don't quite follow that question.

Q. Were you to go together, were the two boats to go together? A. Yes, we were going to go to Sweden Point, we left and went to Alexandria, got gas and left from there for Sweden Point.

Q. Did the two boats go together toward Alexandria? A. Yes, we left together for Alexandria.

325 Q. Did both boats gas up at that point? A. Yes.

Q. Did both boats leave the port at approximately the same time in Alexandria? A. Within close proximity.

Q. Can you tell me approximately where, in the Potomac River, this accident occurred, if you know? A. I am not familiar with the Potomac but it was near Fort Belvoir's officer marina.

Q. And prior to the accident, where were you seated in the boat? A. In the front seat opposite Mr. Engle.

Q. Where was the other passenger? A. In the back seat.

Q. So there were two seats, a front seat and a back seat? A. Yes, sir.

Q. And can you tell me where the Long boat was with respect to your boat as you were proceeding down river sometime prior to the accident? A. He was behind us and off to the right.

Q. Now, we have a diagram on the board, would that be approximately the relative positions of the two boats as they were proceeding down the river? A. Ap-
326 proximately.

Q. Was the boat up here in the front, the lead boat, the Engle boat in which you were a passenger? A. Yes.

Q. And this is Mr. Long's boat? A. Yes.

Q. Before the accident occurred, what was the relative speed of the two boats? A. I really couldn't say, I have no conception of speed on water.

Q. My question was their relative speeds, their speed with relation to the other? A. Oh, approximately the same.

Q. Now, how long a period of time had the boats been going along at approximately this distance and about the same speed? A. I really don't know.

Q. Would it have been a distance of at least—

Mr. Cramer: Objection, he says he doesn't know, Your Honor.

The Court: The objection is sustained to suggesting the answer to him.

By Mr. Gregg:

327 Q. Just before the accident, can you tell me what Mr. Engle was doing? A. I don't quite follow, he was driving the boat.

Q. What did that entail from your observation, in other words, what was he doing, where did he have his hands, and so forth? A. His hands were on the steering wheel.

Q. And which way was he looking? A. Forward.

Q. And can you tell me, then, in your own words, the facts of the accident, to the best of your recollection? A. To the best of my recollection, I was looking forward and Mr. Engle was looking forward and the boat turned right and at that point I looked over at Mr. Engle and noticed that he was trying to pull the boat back left, had cut completely back on the throttle, and that's all I remember until I was in the water.

Q. Now, you say that you observed Mr. Engle fighting with the wheel or trying to straighten the wheel out? A. Yes.

Q. And do you recall a time when he cut back on the throttle? A. Yes.

328 Q. Was this just about the time that the impact occurred with the other boat? A. It was only a

matter of two or three seconds between the time all this took place, as far as the time. When the boat turned right, I looked at Mr. Engle and observe this and that's the last thing I remember until I was in the water.

Q. Then the impact occurred? A. I guess you could say that, yes.

Q. Before the boat went out of control, did you see anything in the area ahead of you that gave you any cause for alarm? A. No.

Q. Before the boat went out of control, did you see Mr. Engle make any sudden motions or movements of any kind? A. No.

Q. Did you hear any sudden noises on the boat or anything of that nature just at the time of the boat going out of control or immediately after it went out of control? A. You mean anything out of the ordinary?

Q. Yes. A. No.

Q. Now, following the impact between the two
329 boats, I gather you were thrown in the water? A. Yes.

Q. At least you ended up in the water? A. Yes.

Q. And you were subsequently taken on board another ship in the area? A. Yes.

Q. And from there where were you taken? A. To the Fort Belvoir marina.

Mr. Gregg: I have no further questions.

Cross-Examination

By Mr. Cramer:

Q. Mr. Weiss, I take it from what you say that you are not a boat operator or at least prior to this accident in 1962, you were not a boat operator, were you? A. That is correct.

Q. Therefore, you do not know, do you, what would give a boat operator cause for apprehension or alarm in the water, do you? A. Would you repeat the question?

Q. Yes. In other words, do you know what elements of the water would cause danger to a boat and boat operation?

A. Natural things such as heavy wakes, logs in the water under boats, obstructions.

330 Q. You didn't see any logs under the water, did you? A. No logs, no.

Mr. Cramer: Thank you.

Mr. Carr: No questions.

Mr. Gregg: No further questions.

The Court: I would like to ask you something. I understood you to say that the Long boat was behind the Engle boat when they started out, did you say that?

The Witness: No, ma'am. I said we left Alexandria, after we got the gas, in close proximity. I don't remember who left first. I said as we were going down river, the Long boat was behind the other one.

The Court: The Long boat was behind, did you say that?

The Witness: Yes, ma'am, when we were on the river.

The Court: When you were on the river, after you passed what point?

The Witness: I don't know, I am not that familiar with the Potomac.

The Court: Well did these positions ever change?

The Witness: Well, after we left the Alexandria gas area, I don't recall who left first, but I know that later down river for a period thereafter we, in the Engle boat were ahead of the Long boat and the positions only
331 changed at the time of the accident.

The Court: Are you saying that the Long boat was behind the Engle boat at the time of the accident?

The Witness: Yes, ma'am.

The Court: How long had that situation continued?

The Witness: How long had the situation continued for what?

The Court: I mean that these boats had been in this position that approximately they were when you say that Mr. Engle started turning to the left?

The Witness: Turning to the right.

The Court: He was trying to turn left, you said.

The Witness: Oh, but the boat had turned to the right.

The Court: Yes.

The Witness: Now, would you repeat the question?

The Court: I was trying to find out how long the boats had been in that position with reference to each other?

The Witness: I don't recall.

The Court: All right.

Mr. Carr: Your Honor, I have one question in line with Your Honor's questioning.

Cross-Examination

By Mr. Carr:

Q. When you said the Long boat was behind the
332 Engle boat, you meant that they were in the relative position that they are on the board, is that true, this being the Long boat and this being the Engle boat? A. Right.

Q. And when this incident occurred, the Engle boat made a sharp turn to the right? A. Yes.

Q. But you don't know how long they were in these relative positions prior to the accident? A. No.

Mr. Carr: Nothing further.

Mr. Cramer: No further questions.

Mr. Gregg: We have no further questions, Your Honor.

The Court: All right, you are excused.

(Witness excused.)

Mr. Gregg: At this time we would like to call Mr. Engle, Your Honor.

Thereupon—

Robert I. Engle

a defendant, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gregg:

Q. Will you state your full name, please, sir?

333 A. Robert I. Engle.

Q. Where do you live? A. 8103 Eastern Avenue, Silver Spring, Maryland.

Q. What is your occupation? A. restaurateur.

Q. And in what restaurant? A. Harrigan's Restaurant in southwest Washington.

Q. What is the address? A. 729 9th Street, S. W.

Q. And what is your position in connection with the restaurant? A. I am the manager, my father is the owner.

Q. And what is your age at the present time? A. Twenty-eight.

Q. Now, Mr. Engle, directing your attention to August (Sic) of 1963, were you the owner of a boat at that time? A. Yes, sir, I was.

Q. And what kind of a boat was it? A. It was a 1962 or '63 18 foot Chris-Craft. 1952 or '53, pardon me.

Q. And how long had you owned that boat, approximately? A. Approximately two years.

Q. And during that time, had you used the boat on
334 a regular basis? A. Yes, I had.

Q. Approximately how often would you operate the boat? A. As much as possible. The restaurant was located about a block from where the boat was docked and I would use it every evening, if possible, when I first purchased it and into the early fall of 1961.

Q. Before purchasing this particular boat, had you also operated other boats? A. Yes, I had.

Q. Had you owned any boat prior to this particular one? A. No, sir.

Q. Approximately how long had you had experience operating other boats? A. Approximately three or four years.

Q. And where was your boat docked? A. The boat was docked at Long's marine service on Main Avenue, on the Potomac.

Q. Is that Long, Thomas Long? A. That is correct.

Q. And did there come a time when you had some work done in connection with the engine on your boat? A. Yes, there was a time.

335 Q. Approximately when was that? A. It was in the winter of 1961-62 and into the spring of '62.

Q. Sometime before this accident occurred? A. Yes, sir.

Q. And who did the work on the engine? A. The work was done jointly by Mr. Long and myself.

Q. And what type of work was done? A. The boat was completely overhauled and refinished and when I say we worked, completely overhauled.

Q. Was anything done in connection with the engine? A. Yes, a new engine was put into the craft upon the overhauling.

Q. By whom? A. By Mr. Long.

Q. And was this engine of the same type as the prior engine? A. The prior engine was a six cylinder, the new engine was a V-8.

Q. Was the new engine the same horsepower? A. The new engine was 230 horsepower Crusader Marine.

Q. And the prior engine was what? A. Estimated 336 131 horsepower, six cylinder, Chris-Craft, either 120 or 131.

Q. Was the new engine approximately the same size as the old engine? A. Yes.

Q. And it fit in the same spot on your boat as the old engine? A. That is correct.

Q. And did not appear to take up any more space than the old engine? A. That is correct.

Q. Now, sometime before the accident, did you have an opportunity to operate your boat in its refurbished condition? A. On what we call shake down cruises, there were times I went with Mr. Long and did take the wheel of the craft and operated it.

Q. And approximately how many times did you operate the boat before the date of this accident? A. With the new engine?

Q. Yes. A. I would estimate to be about two to three times.

Q. Did you experience any difficulty in connection with operating the boat in its refurbished condition? A. No, I had no difficulty.

337 Q. Did you notice anything drastically different in the operation or handling of the boat? A. It was a finer craft, it operated much better than my other, it was more responsive and except for a few minor problems in this shake down cruise, there was nothing that I can remember.

Q. Now, on the date of the accident, which I think has been testified as being August 12, 1962, did there come a time when you met at Mr. Long's boat yard for the purpose of going on a trip? A. Would you repeat the question, please?

Q. Did there come a time in August of 1962 when you decided to take your boat out? A. Yes.

Q. And was this an arrangement that had been previously planned for some period of time? A. Yes, it had.

Q. And what was the general plan to be followed, as far as you can recall? A. An agreement between Mr. Long and I and parties, mutual friends, to, on a particular Sunday, to take both of our crafts down the Potomac River where we would stop off at Sweden Point where we would
338 dine and then return to Marshall Hall or our home port.

Q. In connection with this affair, did you ask certain people to accompany you? A. Yes, sir.

Q. Who did you ask? A. I asked Mr. Weiss and a Mr. Maguire, Dave Maguire.

Q. And did you know who else was going to attend the outing? A. I knew other parties on the Long boat, yes, sir.

Q. Who arranged for the food, and so forth? A. The food was arranged by the parties on the Long boat, the food I can remember.

Q. Was there anything to drink being taken along? A. Yes, there was refreshment taken along.

Q. Do you recall on which boat the refreshments were located? A. The refreshment was located on my craft.

Q. What did that consist of? A. It consisted of a cooler of beer and soft drinks.

Q. Now, was there any discussion between you and Mr. Long with respect to the manner of operation, insofar as going to Sweden Point was concerned? A. No particular items were mentioned except that our destination was Sweden Point and except for stopping off and gassing both boats, we were to go to that point.

Q. Was it agreed, for example, that you would remain in some proximity to each other on your ride to the point that you were going to? A. Yes, we would stay close to each other, not leaving each other, in other words.

Q. Now, after leaving the Long boat yard, where did you go? A. We went to Alexandria marina where we proceeded to gas our crafts up.

Q. Is that in Alexandria, in the City of Alexandria? A. That is correct.

Q. A fairly short hop from Washington over to the Alexandria area? A. That is correct.

Q. And after gassing up, did you then start the trip toward Sweden Point? A. Yes, we did.

Q. Do you recall the relative positions of the boats shortly after leaving Alexandria? A. No, I do not.

Q. Do you recall the relative positions of the boats at approximately Marshall Hall? A. No, I do not.

Q. Approximately how long were you traveling on the boats from the time you left Alexandria to the time this incident occurred? A. Approximately three-quarters to one hour.

Q. And during that time were you operating your boat? A. Yes.

Q. And during that time were you encountering any wakes on the water? A. Yes, many of them.

Q. And did you have any difficulty with any of the wakes that you had encountered up to the point of this accident? A. No difficulty, I had experienced them before.

Q. That was in your prior operation of boats, and so forth? A. That is correct.

Q. And on this particular trip? A. That is correct, sir.

Q. Before the accident happened, can you tell me the relative positions of the two boats? A. Mr. Long's boat was approximately 100 feet to my right or starboard side, and approximately 50 feet behind me.

341 Q. In other words, in the relative positions shown by the two boats on the diagram here on the board?

A. That is correct.

Q. And can you tell me for approximately how long a period of time the boats had been going along in that same relative position? A. Recalling that we had been in this relative position from leaving Marshall Hall, I would estimate for a matter of quarter of a mile. It would be very difficult to tell you in time.

Q. And just before the accident occurred, what was the speed of your boat with relationship to the speed of the other boat, in other words were they both about the same?

A. Approximately the same for both boats.

Q. Was there an occasion when both boats came to a stop for some reason at Marshall Hall? A. Yes, there was.

Q. And approximately how long had you remained there? A. For a short period, I wouldn't estimate more than five or ten minutes.

Q. And after leaving Marshall Hall, did those boats leave at about the same time? A. I do not recall. Approximately. I tried to remember this moment and I couldn't recall which boat left first, I do remember that we did pause at Marshall Hall.

Q. And you do recall that both boats had been traveling along in this same general position for approximately a quarter of a mile at least? A. That is correct.

Q. And this accident happened approximately how far from Marshall Hall? A. Approximately one mile, in front of Fort Belvoir marina.

Q. Now, how was this boat that you had, controlled, what control devices did you have on it? A steering wheel? A. Yes, I had a steering wheel.

Q. And what else? A. I also had a throttle, a hand throttle which was located to my right.

Q. Operated by your right hand? A. That is correct.

Q. On the right hand side of the boat? A. That is correct.

Q. And you push the throttle forward, I gather that that accelerates it? A. Yes.

343 Q. And you pull it back and it decelerates? A. That is correct.

Q. Did the throttle have a smooth control or did it have ratchets on it that stops the throttle setting at different points. A. Both in this case, it did have grooves which it slid into and also at intermediate speeds within the groove.

Q. Do you recall whether or not, just before the accident occurred, the throttle was in a groove or whether you had your hand on it? A. I did not have my hand on the throttle, it was set in a specific position.

Q. In other words, you were maintaining a fairly constant speed? A. That is correct.

Q. Was the throttle set in one of the grooves? A. That is correct.

Q. And where were your hands? A. My hands were on the wheel.

Q. Both hands? A. Yes, sir.

Q. Which way were you looking? A. I was looking straight ahead.

344 Q. Did you see anything unusual as you were looking straight ahead just prior to the accident? A. I saw nothing unusual prior to the accident.

Q. Tell me in your own words, then, what occurred? A. At that time, my boat suddenly went out of control and in a few seconds that passed, I made some attempt to control my boat or bring it under control by a slight turn of the wheel and reaching for the throttle. By that time, I ended up, the boat had collided with Mr. Long's boat and I was underneath the craft, I remember being in the water.

Q. When the boat went out of control, did you have any

difficulty in maintaining your grasp on the steering wheel?

A. No, I had no difficulty; no, I did not lose control of the wheel, my steering wheel.

Q. You say you did turn the wheel to the left? A. That is correct.

Q. In an effort to avoid the accident? A. That is correct.

Q. You say that you were reaching for the throttle? A. I attempted to reach for the throttle, yes.

Q. Do you know definitely whether or not you were able to reach the throttle and to pull the throttle back? A. I do not know whether I was able to touch the throttle.

345 Q. Now, do you know what part of your boat came in contact with the other boat? A. I did not see the accident myself, I only know what was told to me.

Q. And why is it that you didn't see the accident? A. Because my craft had turned and I guess in a short period of time, I just was underneath my craft when it collided with Mr. Long's, underneath or thrown into the water, all of this is not very clear to me.

Q. Now, what happened to your boat following the collision? A. It sunk.

Q. Now, can you tell me what the speed was of the two boats as they proceeded down river? A. Estimated the speed of my craft around 30 miles an hour.

Q. And how did this speed compare with the speed that you were accustomed to with your boat before it got the new engine?

Mr. Cramer: Objection, Your Honor.

The Court: Would you read the question, please.

(The question was read by the reporter.)

The Court: The objection is sustained. When you
346 had this new engine put in this boat, is that the first time that you had had an engine that had that much horsepower?

The Witness: In this particular craft, yes. I had handled crafts previously with this much horsepower.

The Court: Had you owned any craft that had this much?

The Witness: No, I didn't.

Mr. Gregg: This is the first boat that he had owned, Your Honor.

By Mr. Gregg:

Q. Before the accident occurred, were there other boats in the area? A. Yes, there were.

Q. And can you tell me how the speed of your boat and Mr. Long's boat compared with the speed being maintained by other boats in the area? A. Our speed was consistent with the boats in the area.

Mr. Gregg: I have no further questions.

Cross-Examination

By Mr. Cramer:

Q. Mr. Engle, there are a number of schools in the Washington area, are there not? A. That is correct.

347 Q. For boating? A. Yes, sir.

Q. That instruct in boating? A. That is correct.

Q. Have you ever attended such a school?

Mr. Gregg: I object, Your Honor.

Mr. Cramer: I think it shows his qualifications.

Mr. Gregg: He has no more right to ask in this fashion than if I had asked him if he had attended such a school on direct examination.

The Court: The objection is overruled, the witness may answer.

By Mr. Cramer:

Q. Have you ever attended a school for boatmanship and handling of small crafts, a school? A. A school, a school enrollment school?

Q. A school taught by the Coast Guard, the Power Squadron School? A. No, I have not.

Q. Isn't the school that is taught by the Coast Guard a common one in this area for small boat operators?

Mr. Gregg: I object.

Mr. Cramer: I will withdraw that question, Your Honor.

348 By Mr. Cramer:

Q. Now, Mr. Engle, any size swell from any size craft can cause your boat, the boat at the time of the accident, to go out of control, could it not? A. Could you repeat the question, please?

Q. Is it not a fact that any normal size swell or wake from any size craft can cause your boat to go out of control? A. I would say that it is not probable.

Q. Didn't you testify in your deposition, page 28 thereof, didn't you say:

"Any time on the Potomac, from my experiences on the water, any normal swell from any size craft can cause a boat, my boat to be put out of control. It doesn't have to be a large wake. It can be just a normal wake coming from any other craft any other size."

Didn't you say that, sir? A. I said this in my deposition, that is correct.

Q. Now, did your boat hit a wake immediately before it went out of control? A. Did it strike a wake?

Q. Yes, sir. A. There were wakes in the vicinity
349 and I am sure that at the time or around that time that my boat went out of control that I was proceeding over wakes in the area. I do not recall whether I struck a wake at that time, I remember seeing wakes in front of me.

Q. Now, after the accident, within 30 days from the date of the accident, didn't you fill out and file a report with the United States Coast Guard concerning the causation of the accident? A. Yes, I did.

Q. In that report, did you not say that: I was traveling—

Mr. Gregg: Your Honor, I object to any reference to any report filed with the Coast Guard.

The Court: What is the ground of the objection?

Mr. Gregg: That the report is required by law and is confidential by Coast Guard regulations, inadmissible in any court, not subject to a subpoena, and inadmissible in evidence both by statute and by Coast Guard regulations.

The Court: Read the regulation and the statute which you say makes it inadmissible, because ordinarily what a party says may be used to contradict him.

Mr. Gregg: Well, except, for example, in the case of automobile accident reports filed with the Safety Responsibility Division here in the District of Columbia. The
350 law requires all drivers involved in an accident to file a form with the Safety Responsibility Division. The statute also says that those reports are completely confidential, shall not be used in any judicial proceeding in any manner, shape or form.

The Court: Now, you read me what it is that you are relying upon.

Mr. Gregg: Section 46, United States Code, 526(1), (1) and (2), requires the filing of a report with the United States Coast Guard.

The Court: I was referring to the part that you say made it confidential and not subject to subpoena.

Mr. Gregg: The United States Code also provides that a report must be filed with the Coast Guard unless it is required that such a report be filed with the State. In this case, Maryland has a means of accepting reports and in this case the report was filed with the State. The Maryland Code provides and this is quoting the statute: Boat accident reports may not be referred to in any way during any judicial proceeding, are not subject to subpoena and are not admissible in evidence.

Mr. Cramer: Judge McGarraghy has already ruled on the motion to compel production of this document. I filed the motion to compel production and I sought to use this
351 document as an admission against interest solely for the purpose of his credibility, because now Mr. Engle testified that he doesn't know what caused the

accident. I intend to show that 30 days after the accident, he stated to the contrary, so as far as the admissibility is concerned, it is a question of impeachment, it is an admission against interest, and I respectfully submit His Honor, Judge McGarraghy, of course has already ruled on it and our motion to compel production has been granted.

The Court: Well, you know there are a lot of things that may be required to be read in discovery that are not necessarily admissible. Now, Mr. Gregg claims there is some statute which says that this isn't admissible. I thought he had reference to some United States Code provision. Now, you are just talking about something in Maryland now.

Mr. Gregg: That is because, Your Honor, the United States Code provides that the reports must be filed with the Coast Guard unless there is a State reporting agency. In this case there is a State reporting agency, this report was filed with the State of Maryland.

The Court: Well, this didn't happen in Maryland.

Mr. Gregg: Yes, it did, Your Honor. The Potomac is considered Maryland to the Virginia side. Furthermore, Your Honor, the Coast Guard regulations promulgated under this same statute, 46 CFR 173.10, specifically make the reports confidential.

352 The Court: Well, read it to me.

Mr. Gregg: I don't have the language of that regulation, Your Honor. I do have the language of the Code and the reason I took the language of the Code is because it follows that the report having been filed—

The Court: That is the Maryland Code?

Mr. Gregg: Yes, Your Honor.

Mr. Cramer: Your Honor, when we argued this case before Judge McGarraghy, I cited the following authorities, Barron and Holtzoff, a statement in there, Federal Practice and Procedure, 2A, Section 651.2, in which the authority states: A few Courts have held that the fact that the government makes these communications privileged and con-

fidential, that this makes the return privileged from discovery, but there is overwhelming authority to the contrary.

Also, Your Honor, I drew an analogy between the income tax returns. Of course, when you file your income tax return, you cannot subpoena the federal government, the Internal Revenue, to bring it down into evidence and you cannot ask them to come with it, but you can use it to impeach a person on the stand. For instance, if they say their income a certain year was a certain amount but they showed to the contrary in their Internal Revenue form, you can use that in evidence and that is what I am
353 doing here, Your Honor.

Also, unemployment compensation records and Social Security records, in the case of Fidelity and Casualty Company v. Tar Asphalt Trucking Company, 30 Federal Supplement 217—

The Court: What did it hold there?

Mr. Cramer: That case, I believe, Your Honor, held that it was used for impeachment purposes. I am going to have to get out the case and review it, I haven't reviewed these cases since I filed the motion in 1964, this is from my memorandum.

The Court: You know, it seems to me that it doesn't make any difference—Are you trying to offer the report itself or simply to ask him about it?

Mr. Cramer: Just to ask him about it.

The Court: Well, you may ask him what he said on that occasion.

By Mr. Cramer:

Q. Mr. Engle, in your Coast Guard report, did you state that you were driving your speedboat at 30 to 35 miles per hour and you were approximately 100 feet from Mr. Long's vessel when you hit a swell, a wake, and proceeded on a 90 degree angle toward him? Did you tell the Coast Guard that? A. Are you reading right from the Coast Guard report?

354 Q. Sir, did you tell this to the Coast Guard, that this is how the accident happened? A. I recall filling out a Coast Guard report and giving them an explanation for what I thought possibly could have caused this accident, since they asked for one. I don't feel that I stated that it definitely caused the accident.

Q. Did you not state that a possible reason for the accident was that you hit a swell or a wake? A. I did state that possibly I could have hit a swell and this could have caused the accident, yes.

Q. All right. Now, Mr. Long has also in his deposition testified that your boat went out of control as soon as it hit a wake, did he not?

Mr. Gregg: I object, Your Honor, I don't know how this witness could know what Mr. Long said in his deposition.

The Court: The objection is sustained.

Mr. Cramer: Yes, ma'am.

By Mr. Cramer:

Q. Now, were there other boats in your vicinity prior to the accident? A. There were.

355 Q. Would an estimate of 15 boats within a radius of a few blocks be correct? A. I would say there were many boats in the area and this area of the Potomac is quite wide and I would estimate that there were more, there were many boats in the area and they were more than a couple of blocks away.

Q. This was a Sunday, was it not? A. That is right.

Q. Now, the wake referred to by you as possibly or probably causing you to go out of control, did you see that wake prior to the time you hit it? A. I did see wakes prior to the time of the accident.

Q. Did you see the wake that you struck prior to the time? A. I do not recall.

Q. You do not recall seeing the wake mentioned in the Coast Guard report and referred to by you today? A. I

saw wakes in front of my craft, I do not recall whether I hit a wake, this particular wake.

Q. Now, was there any damage to the rudder of your boat? In fact, there wasn't damage to the rudder of your boat, was there? A. There was.

Q. Pardon me? A. There was.

356 Q. There was? In your deposition, on page 32 thereof, you were asked to describe the damage you found on your boat:

"A. Very extensive. The boat was damaged beyond repair. They had—the port side around the water line was severely smashed in. The back of my seat had been completely thrown out. My hatch was lost. My windshield was lost. The upholstery was damaged. The finish work throughout the craft was damaged and that's it."

Now, did you mention your rudder being damaged? A. In my deposition?

Q. Yes. A. If it is not in there, I did not mention it.

Q. You did not mention it and you said that was it, that was the damage done? A. If I said that, I must have said it.

Q. Now, you said that you had operated your boat with a new engine in it two or three times prior to the accident.

A. Yes, sir.

Q. Do you remember the days on which you operated it?

A. No, I do not.

Q. Where were you when you operated it? A. I was on the Anacostia River and also on the Potomac near Long's marine service.

357 Q. I see. Now, Mr. Engle, from the position that Mr. Long was in prior to the accident, assuming this to be his position, he was in a rather good position to observe your craft, was he not? A. Yes, sir.

The Court: What do you mean by that, that he was in a good position to see the whole thing?

The Witness: To observe my craft, yes.

The Court: Is this at the time of the accident?

Mr. Cramer: The accident, Your Honor.

The Court: Well, will you explain why you think he was?

The Witness: In the position that Mr. Long was and considering —

The Court: What position was he in?

The Witness: His craft, I am sorry, the craft which he was in I felt was in a good position to see mine.

The Court: What I am trying to find out is what was the position of his craft with reference to yours that makes you say that?

The Witness: Mr. Long's craft was—The distance from my craft, Your Honor?

358 The Court: Anything that would give you an idea about the relation between the two crafts from the standpoint of location?

The Witness: Well, if Mr. Long's craft, as it was, was behind me, he could not help but see my craft with his normal visibility which he would have.

The Court: Well, now, there has been some testimony here that Mr. Long's craft slowed down and people switched their positions in the boat. Did you see that?

The Witness: I did not notice Mr. Long's craft slowing down, no, ma'am.

The Court: At no time did you notice that it was slowing down?

The Witness: At that time, no.

The Court: Some witness testified that they looked back, back of the Long craft, and saw your boat. Was there any time that you were in back of the Long boat just preceding the accident?

The Witness: Just preceding the accident?

The Court: Well, not just preceding it, but prior to that time.

The Witness: I do feel at one time that I was, not behind the Long boat, but that I was well to the left of
359 the Long boat, and the two boats were converging, in other words making up distance from, shall we say,

a distance of 500, say many yards from each other and were converging.

The Court: You say you were well to the left, but were you as far back as he was?

The Witness: I could have been as far back at one time, yes.

The Court: Go ahead, Mr. Cramer.

Mr. Cramer: I have nothing further, Your Honor.

Mr. Carr: Just a couple of questions.

Cross-Examination

By Mr. Carr:

Q. Assuming the boats were in this position just prior to your boat going out of control, were there any boats immediately in front of the two of you that created any hazard as far as you could see? A. I did not see any boats immediately in front of us.

Q. Now, there has been all types of testimony about boats in the area. Were there any boats in the immediate proximity of you just prior to the accident, within a 100 yards, say? A. No, there were none.

Q. Were there any boats between you and the Long 360 boat? A. No, sir, there were not.

Q. Do you remember any boat passing you going in the other direction just prior to the accident? A. I remember a craft passing, but it did not pass my craft to my port, if that is what you are speaking of.

Q. It did not pass to your left? A. I do not recall. I recall a craft passing well to my right—well to my right.

Q. Would that be to Mr. Long's right, also? A. Yes, sir.

Q. Way over here somewhere, is that right? A. Yes, sir.

Q. Do you remember any boat passing you going in the opposite direction? A. I do not recall any boats passing me in the opposite direction.

Q. There were boats in the area, were they all moving? A. Most of the boats I noticed were moving.

Q. Were they moving generally in your direction south on the river or were they moving up river? A. I do not recall.

Mr. Carr: I have nothing further.

Mr. Gregg: Nothing further.

361 Mr. Cramer: I have nothing further.

The Court: You may step down.

(Witness excused.)

Mr. Gregg: Your Honor, we just have Mr. Long as the last witness prior to Dr. Murphy.

The Court: Dr. Murphy isn't here, is he?

Mr. Gregg: No.

The Court: Well, I looked up this engagement, it is at 12:30.

Mr. Gregg: Could we have a short recess and I could call his office and maybe get him here as soon as possible?

The Court: Yes, we will take a recess of five minutes.

(A short recess was taken.)

Mr. Carr: Your Honor, I am calling Mr. Long, the defendant, as a witness.

The Court: All right.

Thereupon—

Thomas Long

a defendant, called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Carr:

362 Q. Please state your full name, your address and age. A. Thomas Long, 210 Oakwood Street—

Q. Louder, please. A. 210 Oakwood Street, S.E.

Q. What is your age? A. Thirty.

Q. What is your occupation? A. Marina operator and boat maintenance.

Q. Where do you operate this marina? A. At the present time, it is T and Water Street, S.W.

Q. How long have you been working with boats and, more particularly, how long have you operated this marina?

A. This particular marina?

Q. Yes. A. Eight years.

Q. And prior to that, had you done any work with boats?

A. I have about seventeen years' experience.

Q. Have you had any experience in the operation of motorboats? A. Yes, sir.

Q. Describe briefly what your experience is. A. I have raced boats, I have run large boats, work boats, tug boats, I run pleasure craft, I have run pleasure craft for customers, I also bring boats from the Chesapeake Bay area to the Washington area.

Q. Are you familiar with the Potomac River as far south as this accident occurred? A. Very much so.

Q. And were you familiar with this area at the time of the accident, August 12, 1962? A. Yes, sir.

Q. On that particular day, did you own a boat? A. Yes, sir.

Q. What type of boat was it? A. A 1956 Century Coronado, 20 foot.

Q. How long had you had this boat? A. Since 1957.

Q. What kind of engine did it have in it? A. It had a 331 cubic inch 250 horsepower Cadillac Crusader.

Q. Approximately how many times had you operated this particular boat prior to this accident? A. Well, I had run this particular boat 800 hours before the accident.

Q. Is that how they gauge time in a boat, by hours? A. Yes, sir.

Q. This 800 hours, is that prior to this accident?
364 A. That was prior to this accident.

Q. This particular engine that you had in your boat, did that come in the boat? A. That is stock, from the factory.

Q. By stock, you mean it came from the factory with that engine in it? A. It was installed by the factory.

Q. On the date in question, how many passengers did you have in the boat? A. Seven.

Q. Where were they seated in the boat? A. Two were sitting in the rear of the boat, one was sitting on the engine hatch—

Q. Is that Miss Stull? A. That was Miss Stull. There was three in the front seat and one on the front deck.

Q. Now, with reference to the other boat we have been discussing, the 1953 Chris-Craft, were you familiar with that boat prior to the accident? A. Very much so.

Q. Who owned that boat, Mr. Engle? A. Mr. Engle.

365 Q. Did you sell that to him? A. I did not sell him the boat, no, sir.

Q. After he obtained the boat, did you do any work on it? A. Yes, sir.

Q. What work was that? A. Well, we restored the boat to the condition when it was new, '52 or '53, and we also installed a new V-8 engine.

Q. What type of engine did it have in it before? A. It had a six cylinder Chris-Craft.

Q. What was the condition of that engine? A. Fair to poor.

Q. What kind of engine did you replace it with? A. A 327 cubic inch, 230 horsepower Crusader Marine engine.

Q. After you replaced the new engine in the boat, did you personally operate this boat prior to the accident? A. Yes, sir.

Q. And under what conditions did you operate it? A. Well, I run it for top speed, for maneuverability at top speed, I tried to turn it over, which is part of the test that we go through on boats when we repower.

Q. What did you find as a result of making this test, did you find any serious handling problems? A. No, sir.

366 Q. While you were making these tests, did you have any opportunity to pass over any wakes? A. I would make a circle and come back across my own wake, trying to upset the boat.

Q. This was a testing procedure, is that right? A. This is a testing procedure, many, many times.

Q. And in doing this, did you ever have the experience of the boat going out of control, completely out of control?

A. Not completely out of control.

Q. Was it affected at all by passing over its own wake?

A. Well, when you stirred the water up to a great turbulence, it would affect it somewhat.

Q. When you say that you'd pass over your own wake, am I right in saying that you'd come on as fast as you can and spin the boat around and pass right back over where you came from? A. Yes, we call it spinning the boat out, you spin it out.

Q. This is a test of stability of the boat? A. That is right.

Q. And it would pass right back over its own wake again? A. That is right.

Q. And at that point the wake would be rather
367 severe, would it not? A. Yes, sir, and we do it in a circle.

Q. And you did this with the boat owned by Mr. Engle prior to the accident? A. Yes, sir.

Q. And after it had the new engine? A. Yes, sir.

Q. Do you have any recollection of Mr. Engle operating the boat with the new engine in it? A. Yes, sir.

Q. In what kind of condition did he operate it? A. Normal conditions.

Q. Did he do any of these testing procedures, as far as you know? A. No, sir.

Q. By normal conditions, you mean in straight away runs? A. Just as you'd get in any boat and run it.

Q. During these runs where Mr. Engle was the operator, did you pass over any wakes in the body of water that you were operating in? A. Yes, sir.

Q. Did Mr. Engle exhibit any difficulty with passing
368 over these wakes or did he lose control in any way, shape or form? A. In no way, sir.

Q. Now, directing your attention to August 12, 1962, the purpose of the trip has already been testified to, there was some mention of refreshments in the Engle boat, beer and soft drinks. Did you have anything to drink that day prior to the accident? A. No, sir.

Q. Now, after you left Washington, you proceeded where? A. To Alexandria to fuel up.

Q. Then where did you go? A. We left Alexandria and proceeded down the Potomac River towards Sweden Point.

Q. Did you stop anywhere prior to the accident? A. We stopped in the middle of the river at Marshall Hall.

Q. Now, after leaving Marshall Hall and proceeding south, how far was it from that stop to the place where the accident actually occurred? A. Between a half mile and three-quarters of a mile.

Q. Now, after the stop was made at Marshall Hall, which boat started up first? A. My boat.

Q. And how soon afterwards did Mr. Engle start up? A. Well, he was heading up the river, so he had to turn
369 and come back.

Q. He had to turn his craft around? A. He had to turn his craft around and by that time I was already a few hundred feet away from him.

Q. You mean ahead of him? A. Ahead of him, yes, sir.

Q. Did there come a time just prior to the accident that the boats were in the relative positions shown here on the board, your boat being here to the right and the Engle boat being here to your left, about 100 foot to your left and 50 feet ahead? A. That is right.

Q. Approximately how long had they been in these positions prior to the accident occurring? A. (No response.)

Q. Or in distance? A. I would say a quarter of a mile.

Q. In other words, to take you back from the stop at Marshall Hall, assuming the river flowed right off the board here, up to the point where the accident occurred, you started a little ahead, Mr. Engle finally joined you and proceeded a little ahead of you and maintained this position

for about a quarter of a mile when the accident occurred?

A. That is right.

370 Q. What was your speed—

The Court: I thought you said that after you left Marshall Hall that your boat went first?

The Witness: That is right.

The Court: And your boat was a few hundred feet ahead of the Engle boat, is that correct?

The Witness: Yes, ma'am, that is right.

Mr. Carr: Your Honor, this goes back, as I just went through it here, when they left Marshall Hall.

The Court: That is before this period I am asking about.

Mr. Carr: In other words, in the time that they left Marshall Hall to the point of the accident, the Engle boat had caught up and passed a little ahead, 50 feet ahead and maintained that relative position for about a quarter of a mile prior to the accident, so he did start behind and now he is slightly ahead.

By Mr. Carr:

Q. What were your approximate speeds just prior to the accident? A. Thirty miles an hour.

Q. Had these been your speeds since leaving Marshall Hall? A. Yes, sir.

371 Q. What was the condition of the weather and the water on that particular day at that particular place?

A. It was a good day, clear visibility, there was a slight chop on the river.

Q. What do you mean by a slight chop? A. Oh, a wake or waves of three, four, five inches.

Q. What are these caused by? A. It could be caused by the wind or it could be caused by the numerous amount of boats cruising in the area.

Q. Now, were there boats cruising in the area? A. Yes, sir.

Q. Now, directing your attention to just prior to the accident, were there any boats immediately in front of

your boats, namely, the boat operated by Engle and the boat operated by yourself? A. No, sir.

Q. Now, if you can think back to that very moment, where were these other boats primarily in relation to these two moving craft? A. The other boats in the area?

Q. Yes. A. We were on the Maryland side of the river.

372 Q. Going south? A. Going south. The boats that were in the area were on the Virginia side of the river, probably three quarters of a mile in front of us and a quarter of a mile off to our starboard side, our right side.

Q. Were they traveling in the same direction that you were traveling? A. Yes, sir.

Q. There has been some testimony about a motorboat that may have passed your two boats prior to the accident. Do you remember any such boat? A. There was a small boat on the left side, near the Maryland water line, that we passed and I imagine two or three minutes later we might have crossed his wake.

Q. Let me, if I may— A. It was his wake.

Q. This is south, south is down river, the Maryland water line would be on this side, the land line would be on this side, would it not? A. That is right.

Q. And then the Virginia side of the river is to your right? A. That is right.

Q. Now, the little motorboat that was passed, he
373 was passed between the Engle boat and the shore line, is that right? A. Yes, sir, a few hundred yards away from the Engle boat.

Q. How much time elapsed from the time that that motorboat was passed until the accident occurred? A. Possibly two or three minutes.

Q. What kind of boat was it? A. The boat that passed us?

Q. Yes. A. If my memory serves me well, it was a white fiberglass boat with possibly a yellow deck on it.

Q. What kind of a wake did it throw? A. It would throw

a wake right at the very back of the boat, it would throw a wake a foot high but—

Q. Excuse me. After you'd meet this wake a minute or so later, would it have decreased in size or retained the same size? A. Yes, sir, it would decrease.

Q. Do you know actually that this was the particular wake involved or that has been said to be involved in this particular accident? A. No, you cannot say that that is the wake.

374 Q. Were there other wakes in the river? A. Yes, sir.

Q. From the time that you left Washington to the time the accident occurred, can you estimate the number of boats that you either passed or saw on the river? A. From Washington?

Q. Back to the site of the accident? A. A couple of hundred.

Q. And isn't it true that every moving boat leaves a wake? A. Every boat.

Mr. Gregg: May we interrupt this witness's testimony, Your Honor, to put on Dr. Murphy?

The Court: Yes.

Thereupon—

Dr. James Peter Murphy

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gregg:

Q. Would you state your full name, please, sir? A. James Peter Murphy.

Q. What is your profession? A. I am a neurologist and neurological surgeon.

375 Q. Where do you practice? A. My offices are at 1904 R Street, N.W., in the District, and 8218 Wisconsin Avenue in Bethesda.

Q. How long have you been practicing your specialty?

A. In this area since 1946.

Q. And where did you graduate from medical school?

A. From Yale in 1939.

Q. Did you thereafter undergo a residency, special training in your specialty? A. I had postgraduate training in neurology and neurological surgery at Yale, University of Minnesota, University of Illinois and George Washington University.

Q. What does your specialty entail or involve? A. The diagnosis and treatment of physical diseases of the nervous system.

Mr. Gregg: I submit, Your Honor, that the witness is qualified.

Mr. Cramer: Certainly, Your Honor.

The Court: The Court will so rule.

By Mr. Gregg:

Q. Did there come a time when you examined the plaintiff in this case, Miss Immogene I. Stull? A. Yes, sir, on July 29, 1965.

376 Q. Where did that examination take place? A. At my office, 1904 R Street, N.W.

Q. At that time, did the plaintiff make any complaint to you with respect to her then physical condition? A. She made complaints with reference to a residual symptom which she attributed to an occurrence which was said to have taken place on August 12, 1962, almost three years before.

Q. Did you take a history from the patient? A. From the patient and from the medical reports of treating physicians supplied, I was given to understand that on August 12, 1962, she sustained a laceration, meaning a cut, of the base of the left thumb in a boating accident. She further declared and the reports set forth that this injury was seen and treated at the DeWitt Army Hospital originally and she was therefore and thereafter referred to Dr. Koth for further treatment.

She stated she had lost no days from work during the one year prior to my examination because of her hand. She said that she had pain in her left thumb after use of the typewriter, that she had pain in the same area, that is the base of the thumb, when the weather was going to change. She stated that her doctor had told her that arthritis had set in in the joint. She said that she could not lift
 377 anything heavy. She further declared that pain in her left thumb might radiate as far up as the elbow. She stated that she was right-handed; this was the left thumb that was involved.

She said that she had had no previous injuries, that a tonsillectomy was the only previous surgery that had been performed, that she had had no serious illnesses.

I neglected to mention that she had been operated upon, she said and her records set forth that she had been operated upon by Dr. Koth with reference to the accidental injury of August 12, 1962.

Q. And did you make an examination? A. Yes, sir, and the findings were thus and these: Blood pressure was normal, 110 over 60. She was wearing contact lenses in place of regular glasses. The temperature and color of the hands were equal. The pulsations of the arteries in both wrists were equal. Six inches below the point of each elbow, the circumference of the right arm was eight and one-half inches, the left arm was eight and one-eighth inches. This difference I considered to be normal for a right-handed person, in other words, the forearm in a right-handed person is always somewhat larger than the left forearm. The thickness of the pad at the base of the thumb as measured by a caliper was equal at the same point, 29 millimeters.

378 Q. When you say equal, Doctor, do you mean both the right thumb and the left thumb were the same?

A. The pad at the base of the thumb, p-a-d.

Q. On both hands? A. Correct, were equal to each other.

Q. Go ahead. A. There was restriction of abduction, meaning moving out from the midline, there was restric-

tion of abduction of the left thumb of 15 degrees, as compared with normal, in my opinion. There was restriction of flexion, that means bending, forward bending, there was restriction of flexion of the thumb of 10 degrees as compared with the normal, in my opinion, but bringing the thumb towards the midline, that is towards the first or index finger, this ability was equal on both sides.

Q. Would you hold up your hand, Doctor, and show the Court what the motion is? A. Abduction, out from the midline; flexion, bending; adduction, bringing the thumb towards the index finger as in grasping a piece of paper, for example, between the thumb and index finger.

Q. That latter motion, bring the thumb against the hand, was found by you to be normal? A. Equal on both
379 sides, yes, sir. There was a scar of curvilinear, meaning curving scar, one and one-quarter inches long at the base of the thumb which the patient stated was due to the accident. There was a second scar continuing from the one just referred to, going up on the inner aspect of the wrist, two inches long, which was from the operation referred to.

Q. Did you conduct any further tests? A. Amongst these tests was a test of skin conduction of mild electric current called a neurothermometer test which is useful for this reason, the skin perspiration which is going on all the time, I don't mean beads of sweat, I mean normal skin lubrication, is under control of the nerve supply to that part of the body and the skin covering it, in other words, if the nerve supply to the palm of the hand is cut off for some reason, perspiration in this area disappears in a region corresponding to total loss of nerve supply, and if the nerve supply is partially interrupted and the skin perspiration in that area is partially reduced and any change in skin perspiration will also alter the electrical conductivity of that part because perspiration has salt in it, makes a contact and allows a very weak current to flow. So this is an objective test of nerve supply, it is one of the few

objective tests that there are, everything else depending upon the patient's cooperation and response.

380 Q. What did that test show? A. The neurothermometer test revealed exactly the same values over the two hands, in other words, distal, that is beyond the point of laceration and in other areas on the hands, the neurothermometer responses were the same in the right and left hands. Nor was there said by the patient to be any loss of pin prick or vibratory sensation over any of the digits, that means the fingers and including the thumb.

Sensation was equal over the entirety of both hands. Both of these findings are normal, they are negative with respect to the presence or absence of nerve damage. There was not said to be any loss of pin prick over any of the fingers, sensation was equal over the entirety of both hands.

The reflexes in the upper extremities were equal, as were the reflexes elsewhere, and the remainder of the neurological examination was normal.

There was then, in my opinion, objective evidence of residual disability in the patient as a result of the occurrence of August 12, 1962, with reference to the left thumb. It was my opinion at that time that the loss of function of the left thumb with reference to her activities as a stenographer was that of 25% with reference to the use of the thumb alone. There was no evidence at the time of

381 my examination of a neuroma in any of the nerves of the hand or fingers, there was no evidence of a traumatic neuroma, meaning enlargement of the nerve due to nerve section, there was no evidence of loss of nerve supply to the thumb or any other part of the hand. There was no necessity, in my opinion, for further surgery to the hand.

Mr. Gregg: I have no further questions.

Cross-Examination

By Mr. Cramer:

Q. Dr. Murphy, I believe you testified that the plaintiff, Miss Stull, could use her thumb thusly, sir, to pick up a

piece of paper? A. No, I didn't say that. In exhibiting the function I was referring to, I said that adduction of the thumb, meaning bringing the thumb towards the index finger as though one were to hold a piece of paper between the thumb and index finger.

Q. Now, in the holding of a book, let us say, this would be the normal means, is it not? A. Is that a normal way to hold a book? That is one way to hold a book. Some people hold a book with the open palm, there are all different ways to hold a book.

Q. Perhaps a stenographer, sir, would hold it this way, would she not? A. She could.

Q. And in that sense, in that motion there would be some limitation? A. There would be restriction of motion of the thumb because the motion you just demonstrated would involve flexion as well as adduction, and flexion is impaired.

Q. Dr. Murphy, you say you found a 25% disability of the thumb? A. That is my opinion, yes, sir.

Q. Do you believe that to be permanent? A. I guess that could be considered to be a permanent disability, yes.

Q. Dr. Murphy, the thumb is a very important finger, is it not? A. The thumb is considered by physicians, surgeons and even anthropologists to be one of the two most important digits of the hand. The importance of the thumb, of course, bears in part at least upon the handiness of the individual. This is to say that the right thumb is much more important than the left thumb in a right-handed person, the left thumb is much more important than the right thumb in a left-handed person.

Q. In fact, referring to the anthropology allusion you made, has it not been stated that the development of the thumb is what distinguishes man from the ape?

A. I don't believe the distinction stops at that point, fortunately, but I think that the use of the thumbs in the two species referred to is somewhat different.

Q. Well, I thank you for that "fortunate." Doctor, when you tested her for limitation on use of her thumb, didn't

your test also involve the use of the entire left hand? A. I presume, referring to my handwritten notes and to the typed reports, that this manipulative motion of the hand itself was inspected, yes.

Q. Dr. Murphy, is it not true that loss of the function of the thumb would necessarily impose a limitation on the use of the entire left hand in many instances and for many activities? A. Yes, sir, it would.

Q. Therefore, Dr. Murphy, would we be correct in saying that limitation on the function of the thumb of 25%, as you say there was a 25% limitation of function, would also mean a percentage limitation on the function of the entire left hand, would it not? A. Yes, sir, that would necessarily be implied.

Q. Dr. Murphy, is it not considered—well, let me ask you this, please, Doctor: Your expertise is also based
384 upon your readings and keeping current with medical journals and medical advances and discoveries, is it not, sir? A. If it exists, I presume in part at least that's the source.

Q. The plaintiff's injury, in part at least, was a cutting of the digital nerve of her hand, was it not? A. I don't believe it was, no, sir. That is the point of the negative aspect of my examination. There is no evidence that the digital nerve was sectioned. I say that because when a digital nerve is sectioned, and it is a very fine type of nerve, only the most "delicate" and particularized surgery will restore function to the part supplied and, even under those circumstances, the restoration of sensation and skin conduction as measured by the neurothermometer is never perfect. In my opinion, it was perfect in this area and that is why I would state in my opinion the digital nerve was not severed.

Q. Doctor, it is true, is it not, that damage to the digital nerve can give rise to considerable disability of constant deep aching, constant aching, deep aching, within the finger? A. Can the injury to a digital nerve cause pain in the finger and hand? A. Yes, it can.

385 Q. Constant and deep aching? A. This is variable with the individual and with the degree of injury to the digital nerve, once such an injury has occurred.

Mr. Cramer: Thank you very much, Doctor.

Cross-Examination

By Mr. Carr:

Q. Doctor, just a point or so, if I may. I believe you said the limitation of flexion was only 10%? A. That was my opinion, yes, sir.

Q. And that the limitation of abduction was only 15%, is that correct also? A. Yes, that was also my opinion.

Q. Doctor, wasn't it also your conclusion that there was no evidence of present nerve damage? A. That was my statement, yes, sir, I do not believe that there was any evidence of nerve damage at the time of my examination.

Q. And this is the result of the skin lubrication test you made showing the conduction of electricity? A. One of the negative findings, yes, sir, that led me to that conclusion.

386 Q. Doctor, the attorney representing the plaintiff assumed an injury to the digital nerve, which you say you do not agree with, but let's go along with his assumption for a moment. He equated this to a constant pain, is this a pain that occurs at the time of the injury and during the period of time of healing, or is it something to be expected in the long run? A. What pain are you referring to?

Q. We are taking the assumption that there was an injury to the digital nerve, that you were asked about by plaintiff's counsel. I am asking you whether or not this is a source of pain at the time it occurs, I am sure that it is, but is it a pain that gradually decreases with healing? A. Well, as a result of any nerve injury, the amount of pain thereafter, if any, varies of course with the individual and the length of time from the date of injury. Other than the pain which naturally occurs at the time of severance of the

nerve, some people don't have any pain at all several weeks or months later; some people do. Some people have the type of pain which is associated with excessive perspiration which can be measured by this gadget I referred to, for example, which is called causality pain. Other people have pain only when the weather changes, and on and on it goes. There are so many varieties of pain after a nerve injury that time would not permit to discuss or describe
 387 them all, or there may be no pain at all. I have seen many people, many people, who had damage to the ulnar nerve due to an elbow fracture, no question about it, elbow fracture, ulnar nerve damaged, come in with a contracture of the fourth and fifth finger and wasting of the hand, in this instance surgery is effective, but anyway these people don't have any pain at all at the time I see them several days later.

Q. Does the personality of the person involved have something to do with this degree of pain? A. With the degree of pain experienced by a person and his expression of it, yes, I think that is all a matter of human experience, some people are Spartans, others aren't.

Mr. Carr: Nothing further.

Mr. Cramer: I have nothing further.

Mr. Gregg: I have nothing further.

The Court: You are excused, Doctor.

The Witness: Thank you, Your Honor.

(Witness excused.)

The Court: We are going to recess now for lunch and the recess will be until 1:45.

(The luncheon recess was taken from 12:30 p.m. to 1:45 p.m.)

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AFTERNOON SESSION

(The proceedings resumed at 2 p.m.)

Thereupon—

Thomas Long

resumed the stand and testified further as follows:

Direct Examination (Resumed)

By Mr. Carr:

Q. Mr. Long, directing your attention back to the time immediately prior to the accident and when the boats were in the position as shown on the board, were there any boats in the immediate vicinity or close enough to create what you thought to be a possible hazard? A. No.

Q. I believe you already testified the speed of your boat was 30 miles an hour plus, 30 to 35, what was your speed?

A. Advertised speed?

Q. No, what was the speed at the time just prior to the accident? A. Thirty miles an hour.

Q. And how many revolutions a minute would this be translated into? A. Approximately 2800.

Q. What was the maximum revolutions that your
389 engine would make? A. Four thousand.

Q. Now, again referring to the board, what happened at the accident scene, in your own words describe what occurred, the accident itself? A. Well, the Engle boat was in front of me and I was watching him, was glancing off to my left watching his boat and just all of a sudden his boat went out of control and it started toward me and as it did, I immediately turned to the right to avoid a collision with him.

Q. And did the boats come in contact? A. Yes, sir.

Q. What was the point of contact on the two boats, what was the point of contact on your boat? A. His left chine hit my left front deck gunnel.

Q. Where is your front left gunnel? Assuming this is the top of a boat, is this the gunnel, the front left gunnel?

A. Yes, a little farther up.

Q. Is that where the deck meets the side of the boat as the side of the boat comes up? A. That's right.

Q. What portion of his boat was struck, where is
390 the chine? A. The chine is where the sides meet the bottom.

Q. That is just a little below water line, is that right? A. That's right.

Q. And what side of his boat was this chine on that was struck? A. The left side.

Q. Was his boat upside down at the time it contacted your boat? A. Yes, it was.

Q. What occurred immediately after the accident? A. Well, his boat sunk immediately and mine was still afloat and at that time I was helping survivors out of the water.

The Court: You were not knocked out of your boat?

The Witness: Not me, Your Honor. I helped one other passenger into a boat and then I got into my own boat and—

By Mr. Carr:

Q. You say you got into your own boat, were you required to leave your boat any time during this period? A. Yes, I left my boat to help someone else that was struggling in the water.

Q. Who was that? A. Dave Maguire, who was a passenger in Mr. Engle's boat.

391 Q. Then you got back in your boat? A. I got back into my boat and started towards Fort Belvoir.

Q. Was your boat leaking at this time? A. Yes, it was, it was half full of water.

Q. Was it still operating, was the motor still operating? A. Yes, it was.

Q. Were you able to go all the way into shore? A. I was able to beach the boat.

Q. How about the Engle boat, did you say that it sunk immediately? A. Immediately.

Q. At the time that you saw the boat and it was upside down, were the propellers still going around? A. I can't say.

Q. Do you know whether or not the motor was still running at the time the contact was made between the two boats? A. I imagine the motor was still running until the water stopped the engine.

Q. Prior to the accident occurring, did you see any unusual wake in front of your boat? A. Nothing out of the ordinary, there was wakes, we encountered a lot of wakes on our way down the river.

Q. Do you remember seeing any particularly unusual wake in front of the Engle boat which was
392 off of your left front? A. No, a small chop, which you can consider a wake.

Q. Is this the same type of chop that you had been meeting since you left Washington, D. C., that day? A. No, this was a little bigger so you could actually say it was a wake or a wave from another boat. Like Mr. Hildebrand said, a chop comes from a wave.

Q. This was similar to other waves that you had seen the the same day, is that true, that you see on the river every day, is that also true? A. That is right.

Q. I believe you testified that when you saw the Engle boat swerve to its right, that you attempted to turn your boat, is that accurate? A. That is right.

Q. Did your boat actually respond and start turning before the two boats came in contact with one another? A. Yes, sir.

Q. Would you come to the board and give us some idea, using these two models, of how the two boats laid in the water at the time they came together?

(At the board:)

By Mr. Carr:

393 Q. I will bring them in closer proximity so you can work with them, let's assume this boat is coming across, will you show the angle of the two boats, how they were in the water when they made their contact, as best you recollect. A. Well, the Engle boat, coming at this angle—

The Court: Speak a little louder or turn this way, so the reporter can get what you say.

The Witness: The Engle boat coming toward me, when I seen him coming towards me I turned hard to the right to avoid his boat. He hit right here.

By Mr. Carr:

Q. Was he upside down at this time? A. He is upside down and with my boat turning, they come together on the impact.

Q. They first contacted here and then swung together? A. They first contacted here and swung together, because I was still turning to the right.

Q. Did he sink right at that point? A. He sunk right at that point.

Q. And your boat, did it come to a stop there or drift farther on? A. Well, there was a fast tide moving in that area and it drifted away from his boat.

394 Q. Where were all the passengers, in the water around here? A. Well, right after the impact, my boat had drifted away and the survivors were on this side and in here.

Q. Where was this gentleman Maguire that you had to help out of the water? A. He was just off of my boat.

Q. You can resume your seat.

(The witness returned to the stand.)

By Mr. Carr:

Q. After the accident occurred, was the Engle boat ever recovered, as far as you know? A. Yes, it was.

Q. Who made the recovery, did you? A. I made the recovery.

Q. And give us an idea of the damages that you found in the boat, briefly? A. Well, starting with the top of the boat, the bow light was torn off, the front seat was ripped completely out of the boat—

The Court: The front what?

The Witness: The front seat. The steering wheel was hanging down, had been torn loose from the dash-
395 board, the engine hatch was torn off of the boat, the engine beds were split and the engine had moved forward.

By Mr. Carr:

Q. What are the engine beds? A. The engine beds are the wooden stringers that the engine sits on and is screwed down to these stringers. The rudder was gone. The propeller was intact and the shaft was intact, and the strut, but the rudder post was cleaned off at the bottom of the boat.

Q. Do you know what caused the rudder to be gone, was that injured or damaged in the salvage operation? A. This we will never know because someone towed his boat to shore from the scene of the accident, with the boat submerged, they dragged it under water, and of course in dragging it under water, it would tear the rudder off because it is just a shaft and a flat piece of brass.

Q. So it is not known at this time whether this rudder was torn off in salvage or when? A. You can't say.

Q. Had you boated with Mr. Engle prior to this particular accident? A. Yes, sir.

Q. Had you seen him operate a boat prior to this
396 accident? A. Yes, sir.

Q. Had you ever had any problems with him as a boater, was he, to use a colloquial term, a hot rodder?

Mr. Cramer: Objection, Your Honor.

The Court: The objection is sustained.

Mr. Carr: Your Honor, I believe that concludes the questions I have of this witness.

Cross-Examination

By Mr. Cramer:

Q. Mr. Long, you and Mr. Engle were doing about the same rate of speed immediately prior to the accident, were you not? That's right.

Q. And your boat was going how fast? A. Thirty miles an hour, approximately.

Q. And that's 2800 revolutions? A. 28 to 32, depending on your load.

Q. I see. Now, if you were going more than 28 revolutions, you would be going more than 30 miles per hour, you'd be going more than 30 to 35 miles per hour, wouldn't you? A. They have a breakdown for RPM's per hour and it wouldn't come to 35 miles an hour. 3500 RPM's would probably give you 33 miles an hour.

Q. Thirty-three miles per hour. So do you now
397 feel that you were going 33 miles per hour? A. No.

Q. You were doing more than 2800 RPM's were you not? A. I said in my deposition between 28 and 32.

Q. Isn't it a fact in your deposition you said 2800 to 3400? A. (No response.)

Mr. Cramer: May I show this to the witness, Your Honor?

The Court: Yes, you may.

(Mr. Cramer handed the deposition to the witness.)

The Witness: You are right, 3400.

By Mr. Cramer:

Q. So you were going more than even 3200 RPM's you were doing 3400 RPM's? A. My cruising speed on that boat is 2800 RPM's and I usually maintain 2800 RPM's.

Q. But in your deposition, you said 28 to 3400, did you not? A. That's correct.

Q. Now, when the accident happened, you could see Mr. Engle's boat, could you not? A. That's right.

398 Q. Prior to the time that he or his boat veered off and headed in your direction, immediately prior to the time that it veered off its course, it struck a wake, did it not? A. Would you repeat that question?

Q. The boat veered off, the Engle boat veered off and in your direction after striking a wake, did it not? A. That's right.

Q. Mr. Long, you said that there were at least 200 boats on that Potomac River that you had passed or had seen that day? A. That's right.

Q. And a boat a substantial distance away from your boat will leave a wake, will it not? A. Yes, it will.

Q. A boat can hit a wake from another boat when it didn't even see the other boat, isn't that possible? A. That's possible.

Q. And of course, Mr. Long, a driver of a boat should always be on the lookout for wakes, should he not? A. He should have his eyes in front.

Q. How long after you stopped at Marshall Hall—how much time elapsed, I am sorry, between the time you stopped at Marshall Hall and the time of the accident? A. Approximately fifteen minutes.

399 Q. When you stopped at Marshall Hall, did you not pass cans of beer to Mr. Engle's boat? A. Repeat the question.

Q. When you were at Marshall Hall, didn't you pass or someone in your boat pass cans of beer to Mr. Engle? A. No, it was passed from Mr. Engle's boat to mine.

Q. When you stopped at Marshall Hall, did you open cans of beer for Mr. Engle or someone on his boat? A. Yes, sir.

Q. At the time of this accident, Mr. Engle had then open cans of beer in his craft, did he not? A. That's right.

Q. Mr. Long, was Mr. Engle drinking— A. No, sir.

Q. —a can of beer? I didn't finish the question, but presuming that the answer might be that, I will carry on.

After you installed the motor, the new motor in Mr. Engle's boat, didn't you tell him to be careful with this new motor until he had the full feeling of it? A. Yes, I advised him to feel it out before he run it at any high rate of speed.

Q. Mr. Long, you described, did you not, the testing that you gave Mr. Engle's boat and you told then
400 that you drove it through certain wakes, is that correct? A. That is right.

Q. I believe you said, did you not, Mr. Long, that when going through these wakes, you would momentarily lose control of the boat and then bring it back and right it up again? A. Once we lost control of the boat by circling in our own wake.

Q. Now, Mr. Engle, prior to the time of the accident, only had two hours of experience with that new motor, driving it himself, is that correct? A. Driving it himself?

Q. Yes, sir. A. Two to three hours.

Q. Two to three hours' experience? A. That's right.

Q. Now, you have had considerably more experience with boats than Mr. Engle, have you not? A. Yes, sir.

Q. You were able to correct this going over the wake, this loss of control in going over the wake, were you not? A. Yes, sir.

Mr. Cramer: I have no further questions. Thank you.

401 Cross-Examination

By Mr. Gregg:

Q. At the time of the impact between your boat and Mr. Engle's boat, did you observe which side of your boat your passengers went out? A. Well, from where they were in the water, I would say they went out the left side of the boat.

Q. Which side, now? A. Left side.

Q. That would be this side over here? A. That's right.

Q. The boat was struck on the left side? A. That's right.

Q. And at the time of the impact, is it your testimony that the Engle boat was upside down with the propeller up in the air? A. Yes, sir.

Q. And that boat, at the time of the impact, was somewhere up in this area? A. That's right.

Q. Did your passengers fly out toward that boat or go over the side? A. One passenger flew out over the
402 bow of Mr. Engle's boat, that was sitting on the front deck. The people in the stern of my boat, I don't know which way they went.

Q. Did you see any of the people that were in your boat come in contact with Mr. Engle's boat as they were going over the side or after they were already over the side? A. No.

The Court: Do you know who it was that went over his boat, which passenger of yours?

The Witness: Susan Colburn.

By Mr. Gregg:

Q. Now, the operation in the handling of a boat is somewhat different than the operation of an automobile, is it not? A. That's right.

Q. On the particular type of boat that you owned, if you pull back on the throttle, you didn't have to apply any brakes or anything of that nature? A. No.

Q. Merely pulling back on the throttle reduced the speed? A. That's right.

Q. And if you suddenly pulled back on the throttle, the boat would come to an almost immediate stop, would
403 it not, if you pulled back suddenly? A. Yes, it would.

Q. And similarly, the boat is controlled, insofar as turning from one direction to another, by a steering wheel? A. That's right.

Q. Which is attached to a rudder? A. That's right.

Q. And on this particular type of boat, if you turn the wheel sharply one way or the other, the boat immediately

responds and goes in the direction in which you turn it?

A. That's right.

Q. Now, before the accident occurred, the distance separating the two boats was approximately 100 feet, was it not? A. That's right.

Q. That would be from sideways to sideways? A. Yes.

Q. And it could have been perhaps even more than that? A. I would say it was more than a 100 feet, but it come to the idea of a 100 feet.

Q. You'd say somewhere between 100 and perhaps 150 feet? A. That's right.

Q. So that the Engle boat was at least 100 feet and perhaps 150 feet to your left at the time that you
404 saw it go out of control? A. That's right.

Q. Now, if at that point you had pulled back on your throttle, you would have stayed 50 feet back, would you not? A. Well, you have a certain amount of drift when you shut down on your throttle.

Q. You would drift somewhat? A. Yes, you have your momentum.

Q. Would you have drifted 50 feet, from here up to say here? A. Yes, sir.

Q. But you would have drifted at a slow rate of speed, would you not? A. It would have been a slowing rate of speed, it would come down off of a plane.

Q. And by a plane, you mean one of these boats in the water, only the rear portion of it is touching the water when it is planing? A. Not exactly the rear portion, the middle of the boat to the stern, it actually lifts up on the water and planes.

Q. The front of the boat lifts up out of the water and you only have perhaps from half of the boat toward the back
in the water? A. That's right.

405 Q. Now, similarly, if you had turned the wheel immediately upon seeing this boat go out of control to your left or to your right, you could have turned within 50 feet? A. You have a certain amount of slide on the water.

Q. I understand. A. In this case, I thought it would be best to cut hard to the right and try to avoid him.

Q. When you first saw the boat coming toward you, you didn't—well, you didn't pull back on your throttle immediately, did you? A. No.

Q. You didn't cut hard to your right immediately? A. When I seen him turn and start towards me, I had already started into my right turn to get away from him.

Q. Wasn't there a period of time when you watched the Engle boat cutting towards you before you turned your wheel to the right? A. Yes, I had seen him make his turn and started towards me and then I turned to avoid him.

Q. And there was a period or a matter of at least two or three seconds during which time the Engle boat was coming toward yours? A. It was a short amount of time, it was quick.

406 Q. And it was obviously out of control? A. That's right.

Q. And you could see that the operator of that boat could not turn one way or the other? A. No, he was in no position to turn.

Mr. Gregg: I have no further questions.

Redirect Examination

By Mr. Carr:

Q. Mr. Long, the turn that you did make was to avoid the other boat, isn't that true? A. That's right.

Q. That was your decision in the seconds that were involved, right? A. That's right.

Mr. Carr: I have nothing further.

Mr. Cramer: I have nothing further, Your Honor.

The Court: Did you hear anybody on your boat, a lady make some comment about Mr. Engle's boat?

The Witness: Yes, I did.

The Court: You heard that?

The Witness: Yes.

The Court: Well, which way were you looking then or did you look after you heard that?

407 The Witness: I was looking at Engle's boat.

The Court: At the time?

The Witness: At the time.

The Court: Well, where was it, with reference to your boat at that time?

The Witness: Just as the diagram shows.

The Court: You mean that the Engle boat was ahead of your boat?

The Witness: Yes, sir.

The Court: Well, I think the testimony was that this lady who made this remark was sitting facing the back of your boat?

The Witness: No. She was looking at Mr. Engle's boat.

The Court: You mean on the side, so to speak, of your boat?

The Witness: The lady that said that was standing up in the front seat of my boat, looking over the windshield.

The Court: And you had the boat, the Engle boat under view at that time, yourself?

The Witness: That's right.

The Court: All right, you may step down.

By Mr. Carr:

408 Q. What comment did you hear made? Maybe we are speaking about two different things? A. What does he think he's doing?

Q. When that comment was made, what does he think he's doing, had the Engle boat already started to swerve off to its right? A. That's right.

Mr. Carr: I have nothing further.

The Court: You mean it had started to swerve toward you or that it was starting to get out of control?

The Witness: It started out of control and had started making his turn.

The Court: Did it go out of control before it turned, or not until after it turned, or at the time it turned?

The Witness: The only way you'd know it was out of control was when it started turning and coming, twisting over at the same time.

The Court: All right, you may step down.

(Witness excused.)

Mr. Gregg: Your Honor please, at this point I would like to read certain phases of Defendant Long's deposition. Page 30, on line 11, which is referring to the moments just prior to the accident, a question was asked:

409 "Q. But, as soon as he turned to his right did you do anything about the situation?"

The Court: Where is that?

Mr. Gregg: Line 11.

The Court: I must have the wrong page.

Mr. Grigg: Page 30.

The Court: There is nothing like that on this page.

Mr. Gregg: This is the Defendant Long's deposition.

The Court: All right.

Mr. Gregg: The question was asked:

"Q. But, as soon as he turned to his right did you do anything about the situation?"

Answer by Mr. Long:

"A. When he first went—make this out of control—it looked as though it was just out of control and it was in the trough of this wake and it was turning from the torque of the propeller I immediately made a right turn or started bearing right to avoid him from landing in my front seat.

"Q. Now, how far was he away when you made your right turn? "A. That's hard to say. You are stunned when you see something like that coming at you, but
410 he could have been 20 feet away from me.

"Q. Well, if we assume he was a hundred to 150 feet out to your left when he suddenly turned to his right, did you do anything between the time he was that distance and the time that he was 20 feet from you? "A. Yes, I was standing there petrified."

That is all, Your Honor.

Mr. Carr: Your Honor, I have a few segments, also, to read, first from the deposition of Miss Stull on page 49.

The Court: Forty-nine?

Mr. Carr: Forty-nine, line 6:

"Q. Your boat, as you were going along at around 30 knots, left a wake behind it? "A. Yes, it would have.

"Mr. Cramer: He is asking you what you know, not what you think.

"The Witness: I think it would have.

"Mr. Cramer: Could you repeat the question?

"The Witness: I know what he is saying. From the motion of our boat in the water, did it make a spray and like small waves in the back of our boat.

"By Mr. Channing:

411 "Q. Yes. A wake. "A. It wasn't leaving that much, no. In other boats that I have been in, we had to go faster to get more water on us. I know that day we were sitting there and there wasn't any water coming up.

"That is why Natalie was sitting up on the front of the boat. We were going slow enough that had she been terribly long, she could have put her feet in the water and it wouldn't have hurt her.

"We were going along more or less looking at everything. That was the first time Sue had been in a boat.

"You know the ship that came in that day with all of the big sails on it?

"Mr. Cramer: The ship that was in the picture, 'Mutiny on the Bounty'?

"The Witness: Yes. That was in the water. We had stopped and taken pictures of it. We were going along looking at everything. We weren't breaking our necks to get there, because it was the first time Sue had been in the area and we all enjoyed being in a boat."

And on page 46, the same deposition, starting at line 11:

412 "Q. Was he catching up with you as you looked out to the rear and saw him coming toward you?"
"A. Yes. He was coming very fast. In fact, if it hadn't happened, he would have been way ahead of us in the water, because we weren't going fast."

"Q. What speed was Mr. Long going at the time the accident happened?" "A. I can't judge as far as speed goes, but we weren't going fast. I don't know how fast it is in a boat. I would say maybe 30 miles an hour, but we weren't going fast."

On page 39 of the same deposition, line 21:

"Q. So he came up on your boat and ran right into you. Is that right?" "A. That is right. This is the way it appeared to me. He was coming up in the water. He was going fast. All at once, he shot right over into us."

The next page, line 1:

"Tommy saw him coming. When he saw him coming, he right away turned the wheel. That is when I think Susan was thrown from the boat, the little girl that was sitting on the bow."

On page 29 of the same deposition, Your Honor, on 413 line 17:

"Q. Do you actually have trouble every day with this thumb at work?" "A. No. I don't, for the simple reason that every once in awhile we have a period where we don't have that much work, and it is just routine—letters or that sort of thing."

"On those times, I help with the filing and, of course, I do all of our mail and things like that."

The last one on this deposition, page 26, line 23:

"Q. What is the usual pattern of the pain during the normal working day?" "A. I would say around noon I start and my hand bothers me a lot."

"Q. That is your left hand?" "A. Yes."

Now, Defendant Engle's deposition, Your Honor, only one or two items, on page 20, line 7:

"Q. Did you see Mr. Long's boat do anything which gave you—which made you apprehensive just prior to the accident? You have to say yes or no. "A. To my knowledge, no.

414 "Q. Your answer is no? "A. I had not—I wasn't—at the time I wasn't looking for Mr. Long's boat and was continuing on my way to the designated spot that we would meet.

"Q. Your answer to that question is, no, you saw him doing nothing that made you apprehensive about his boat, is that correct? "A. Correct."

On page 15 of the same deposition, line 7:

"Q. In other words, you are saying you don't know how this accident occurred? "A. I am saying I do not know what caused the accident. I do know what happened to create the accident.

"Q. Describe what happened then? "A. Going down the river my boat swerved sharply to my right and went out of control and a collision took place seconds afterwards and I found myself in the water."

That is all, Your Honor, on this deposition.

Defendant Long has nothing else. We rest.

Mr. Gregg: Defendant Engle rests.

Mr. Cramer: I am prepared for the closing argument, Your Honor.

415 The Court: All right. How much time do you all expect to take for the closing argument?

Mr. Cramer: I would request 20 minutes and hope to do it in less, Your Honor.

The Court: How much time did you want, Mr. Gregg?

Mr. Gregg: I would say approximately the same time, Your Honor.

The Court: Approximately what?

Mr. Gregg: The same time.

Mr. Carr: Your Honor, I am debating the feasibility of doing this at this time, I would like to make a motion as concerns Defendant Long and I've got a motion in this case for a finding for Long on the complaint and on the cross claim and I say this for a very good reason, I won't go into a detailed argument because if you don't agree with me basically, I will be rearguing the same thing a half hour from now.

There's been no testimony presented by the plaintiff that the Long boat, I refer to Long as the Long boat, did anything wrong. His own expert was called, apparently, to establish that Mr. Long was in a danger position and finally admitted that he was in a relatively safe position. The indications of speed and overpowering never did apply to the Long boat, he had a stock boat, by that
416 I mean he had a boat with the engine that was built into it.

The Court: Now, before you go any further, I would like to say that I would like to hear Mr. Cramer's argument before I pass on your motion.

Mr. Carr: All right, Your Honor.

Mr. Cramer: May it please the Court, I address myself to two principles, one, the act of negligence and the damages. The testimony in this case from Mr. Engle himself and from Mr. Long—

The Court: Just one moment.

Will you keep track of his time?

The Clerk: Yes, Your Honor.

The Court: And when he has used about 15 minutes, you tell him.

Mr. Cramer. The testimony from Mr. Engle and Mr. Long is that they, at the time of the accident, were driving between 30 and 35 miles per hour. Actually, the testimony from Mr. Long on his cross-examination would lead us to believe that he was perhaps doing in excess of the 30 to 35 miles per hour and that Mr. Engle, of course, was doing

in excess of 30 to 35 miles per hour, too. He testified that he was doing 2800 revolutions or RPM's and that that was equivalent to 30 to 35 miles per hour and he admitted on cross-examination he was actually doing
417 3400 RPM's.

The testimony from Mr. Long, who observed the accident, was that Mr. Engle hit a wake that was a foot high, that the moment he hit the wake his boat spun out, so to speak, and headed toward Mr. Long's.

Mr. Engle then testified that his boat did spin out of control but he doesn't know what caused it. However, in cross-examination, he admitted that within 30 days after the accident, which was more than three years ago, he had a better idea of what caused it, as he stated in the Coast Guard report, that he hit a wake and after hitting the wake, he went out of control.

The testimony from Miss Stull was that there were at least 15 boats, larger boats, within one or two city blocks of the area of the accident, prior to the accident.

Our expert witness testified that Mr. Engle should have anticipated wakes when in a well-populated river and he considered this to be well populated.

Mr. Long also testified that he saw about 200 boats in the water that day in the Potomac River; that a boat a substantial distance away can leave a wake, a boat that you don't even see. Mr. Long also testified that good seamanship, boatmanship, requires that the operator be on
418 the lookout for wakes.

The expert also testified that Mr. Engle should have been operating at a reduced speed, lower than 30 to 35 miles per hour in a water that was as populated as this one. He also testified that under the conditions then existing that day, Mr. Engle should have seen a wake that was more than 100—he should have seen it when it was more than 100 yards away.

Rule 29 of the Inland Rules of the Road, which is Title 33, Section 221, provides:

Nothing in these rules shall exonerate the owner of any neglect to keep a proper lookout or the neglect of any precaution which may be required in the ordinary practice of seamanship.

And this was applied in many federal cases. In one of them, a case entitled "The Adventuress," 214 Fed. 835, the Federal Court in Massachusetts said, in a case involving a collision between two motorboats, that an operator must observe reasonable care and prudence not only against present dangers but against impending perils, he must take seasonable measures of precaution.

The only way that the defendant Engle attempts to explain the causation of the accident other than hitting a wake which he should have seen, was perhaps he
 419 hit a submerged object. But the defendants' own expert, Mr. Hildebrand, testified that had he hit a submerged object, he would have known it, it would have made a sound, it would have been unusual.

Mr. Hildebrand also testified that an operator on the Potomac River or any operator of a speedboat must be on the lookout for wakes and that 30 to 35 miles per hour, which might be a safe speed under certain conditions, might have to be reduced when other boats were in the area about to cause or which did cause wakes.

This is especially a heavy burden upon Mr. Engle, for he testified that in his boat, any wake, any small wake, will cause his boat to go out of control. So, therefore, it would seem that he would have even a heavier obligation to be on the lookout for wakes, realizing that any of them could cause him to go out of control.

As to Mr. Long, and I know the question is going to come up from the Court, I am sure, I can't honestly say that I know anything that he did wrong.

The Court: In the beginning of this case, you said something about a situation comparable to comparative negligence. I have forgotten now what citation you gave me on that, if you gave any.

Mr. Cramer: I believe, Your Honor, that it was
420 Mr. Carr who referred to that, that is a maritime
principle, Your Honor. Mr. Carr nods that that
is correct.

If it please the Court, I would like to proceed as to the
damages. The setting of this accident was frightening,
even Mr. Long testified that when he saw the Engle boat
coming toward him, he was petrified. The plaintiff, who
can't swim well, finds herself in the middle of the Potomac
River. She looks at her hand and blood gushes from it,
in fact she can see to the bone of her hand.

She endures a two-hour operation at Fort Belvoir, where
one doctor holds the joint as far back as it will go and
where he sews the nerve and the tendons and the muscles,
and during this period of time the anesthetic wears off.

During three years and three months since the accident,
the plaintiff visits four doctors more than sixty times.
The plaintiff's doctor, Dr. Koth, describes the pain as a
deep, constant aching pain, interrupted by sharp pain
when the exposed nerve is touched. And as Dr. Murphy
testified, it is generally a medically accepted opinion that
damage to digital nerves in the hand can cause a deep,
constant aching.

Now, the plaintiff's doctor describes the only way or
relieving the pain in her hand. He says the only way
you can relieve it is to cut the nerve, but he feels
421 that this would cause more of a disability than
the present disability.

Now, the defendants say, well, if the plaintiff is hurt as
bad as she says, she should in effect have been at Dr. Koth's
far more often than she was. But Dr. Koth said that in
addition to the several times he has seen her in the last
year, she has called and he has prescribed medication for
relief of pain.

I suppose that if the plaintiff did go to the doctor far
more often than she did, she would be accused of being a
person wanting to run up her case, run up the damages.

It is sort of like stop smoking, the best way you can do it is not to think about it.

Now, the plaintiff's doctor has testified that the plaintiff's joint in her hand is neuralgic and he described it as similar to arthritic and he says she will have it for the rest of her life. Dr. Koth thinks that the wearing of a glove or a pad over her hand will help at times. But, Your Honor, Miss Stull is a normal young lady. She doesn't want to bear the appearances of being handicapped. I don't know anyone who would want to bear these appearances.

Dr. Koth testified that the plaintiff has a 25% permanent limitation in the use of the function of the entire left hand.

Almost every function of the hand involves the use
422 of the thumb. In just thinking about this case the last few weeks, I just tried to visualize doing anything with the hand without the use of the thumb and I find that almost every function of it requires the use of the thumb. It has been said that the partial loss of the function of the thumb is like the loss of one-half of a scissors.

Now, the plaintiff's and defendants' medical testimony agrees in a wide extent. Dr. Murphy testified first that there was a 25% limitation of the thumb, later Dr. Murphy said that the limitation was of the entire hand and not just of the thumb. Dr. Murphy also agrees that the limitation is permanent.

Where the doctors don't agree is this. Dr. Murphy says that if it is a digital nerve that was cut, yes, it is a deep, aching, constant pain. He believes, however, that the digital nerve was not cut. However, Your Honor, he never examined this finger, this thumb, from the inside; Dr. Koth did.

Dr. Koth testified that he sewed the digital nerve and also he testified that at Fort Belvoir the records he saw showed that the doctors there had initially sewed the digital nerve.

Dr. Murphy just didn't have the opportunity to see the digital nerve that was actually cut and he only examined

her for a half hour, as opposed to almost 30 times,
423 I think, that Dr. Koth saw Miss Stull.

Your Honor, I think that the plaintiff's situation is similar to a car that has been damaged. You take it to a repair shop and it looks fine, after it is repaired. But the frame of it is bent and it never rides the same.

A small part of the plaintiff's entire body has been damaged, but one of the most essential parts of her body has been damaged and when you dwell on it and think about it, you realize just how essential it is. The hand is the handmaiden of the brain. Her life will never be the same. Her hand will never be the same. She will never have the same function, never have the same use. She will always have a neuralgic condition in her hand.

Your Honor, I tried in every way I know how to display to this Court the plaintiff's pain and suffering. I would like to, in conclusion, use the board for one moment, if I may, Your Honor.

The Court: I hope you are not going to put something up there and do some multiplying.

Mr. Cramer: No, I have got the multiplication done. Your Honor, may I respectfully suggest that the plaintiff has a life expectancy of 55 years. There is testimony from

both the defendants' doctor and the plaintiff's doctor
424 that her loss of function of the hand is permanent.

I respectfully submit, Your Honor, that if the plaintiff were awarded the modest sum of \$500 a year for 55 years, she would be entitled to \$27,500. Her special damages were \$1600. If she were awarded \$500 a year for the past three years and three months, and I would certainly think for all the operations and all the pain and the tragic events, that would be as reasonable as could be, she would receive—(Mr. Cramer wrote the figure \$1500 on the board)—the total amount would be \$30,600.

All I can say, Your Honor, is that I think that \$500 a year is very reasonable. Certainly \$500 for each of the past three years is extremely reasonable. I suggest, Your

Honor, and very respectfully suggest and earnestly that this represents a modest sum and not one penny more than she is entitled to, and we respectfully request an award in the amount of \$30,000, Your Honor.

Thank you very much.

The Court: Mr. Gregg.

Mr. Gregg: As Your Honor knows, I represent Mr. Engle.

The Court: Yes, I do.

Mr. Gregg: Your Honor, there are several aspects
425 of this case, first of course, is the nature and the
extent of the injuries suffered by the plaintiff.
Second is the question as to the manner in which the
accident occurred and related to that, of course, is the
question as to whether or not this accident was caused by
the negligence of my client, Mr. Engle, or the negligence of
Mr. Long, the co-defendant, or the negligence of both. And
closely related to that, of course, is the question as to the
rights or the liabilities of these two defendants as against
each other on the cross claims that they have asserted
against each other for contribution.

Now, I will deal first with the plaintiff's injuries. It is
clear that the plaintiff in this case did suffer a cut, described
as being approximately two and a half inches in length, on
the inside of her left thumb. The wound was sutured and
it healed well within a period of a month.

Her physician's notes, Dr. Koth, testified to from the
witness stand, indicate that he discharged her on September
1, 1962. The accident occurred on August 12th. From that
point on, the evidence and the question as to the nature of
the plaintiff's injuries becomes involved and complicated.

We have heard the plaintiff describe the nature of her
injuries and her condition. We also have certain evidence
before the Court that tends to place her description
426 more in the category of adjectives than of truth.

Her doctor's records, for example, are not con-
sistent with her testimony and, as a matter of fact, her

doctor's records are not even consistent with her doctor's testimony.

The clear facts are that the doctor saw her a total of five times during the last four months of 1962. He saw her thereafter in 1963, the following year, a total of 11 times, several of those times being in connection with surgery where he removed some scar tissue. He saw her twice in 1964 and twice in 1965.

When he last saw her before the trial began, in August of 1965, his notes, as he testified to from the witness stand, indicated that this plaintiff had a good range of motion in her thumb. The reference to pain was made as being an aching type, present only after a long day or a full day's work and during inclement weather.

His notes indicated that he told her at that time to use her thumb more, not to artificially hold it up in this fashion, because such action on her part was causing atrophy, a wasting away of the muscle, and weakness that normally follows such atrophy, and it must be concluded, because the doctor felt, that her cocking her thumb up in this fashion made her constantly conscious of the
427 condition, much beyond the proportion that it really deserves.

The plaintiff here is a clerk-stenographer whose left thumb is used little in her typing. We submit, on the basis of the evidence, it could be used completely, considering the narrow range to which a left thumb is put in conjunction with the operation of a space bar, an electric typewriter that requires no more than a mere touch; that it has not been a disability to her in her work.

We had one voice of reason in connection with the plaintiff's evidence and that was Mr. Ward, her civilian supervisor. He stated that he noticed that she cocked her left thumb up when typing, but that her typing ability was normal, it was as well as could be expected and it compared with the other girls doing the same type of work in his office; that she is a completely satisfactory employee and,

furthermore, that only after a long period of time, a full day's work or three-fourth of a day's work, does her work slow down and even then her work previously has been sufficient so that she would already be ahead of the production of the other girls.

Mr. Ward's testimony was produced by the plaintiff, and to the extent that her own testimony varies or contradicts it, we submit that the plaintiff cannot be heard to do so, to argue against it, because in effect she would be
 428 impeaching the testimony of the witness that she, herself, called.

We submit that the plaintiff's efforts to overstate and exaggerate her claim are clear; that the injury, if placed in its proper perspective, was a cut or a laceration that healed without a great deal of complication. The complication was removed by the operation, the operative procedure.

The plaintiff was left with minimal effects consisting, I submit, of a somewhat limitation of motion in the thumb; that she herself complicated this matter by her own failure to follow her own doctor's advice to use the thumb to obtain more complete function.

There are several inconsistencies in connection with her testimony. I am sure that Your Honor observed the witness at the witness stand grasping articles in her left hand, she walked from the witness stand over to the board holding the chalk in her left hand, she rubbed her hand, Your Honor looked at it and felt it, and at no point did I observe any grimacing or any evidence that this wound was anything more than a scar across her thumb, with one exception, that is when Your Honor asked her to put her thumb across her hand, it appeared that the thumb came within half an inch to an eighth of an inch of her little finger. And when she moved her thumb all the way back this way, it did
 429 not appear to go perhaps within an inch of the distance of the other thumb.

Apart from those very minimal limitations, indicating that she had a motion from here to here, complete

motion in all other directions, the thumb was not a really disabling part of this lady.

Other inconsistencies were her testimony that her thumb was cut on the propeller of my client's boat. This, I submit, is an indication that she is exaggerating her case. She, of course, could not know where or what she cut her hand on, she was thrown over the side of the ship and into the water.

The testimony is that the Engle boat was upside down, with the propeller up out of the water. Nobody came in contact with the boat, much less the propeller which was standing up in the air.

Furthermore, when her deposition was taken, a period of a little over a year ago, her testimony was that her hand did bother her occasionally, primarily after a full day's work or during damp weather, and the history given to her doctor and her doctor's notes, and Dr. Murphy's testimony, was the same.

Her version of the accident, furthermore, as distinguished from all other parties who participated in it, is different and again I offer that as evidence of inconsistency in her testimony.

430 Furthermore, we had before us the testimony of Dr. Murphy, a neurosurgeon, a specialist in nerve injury and nerve damage. It was his testimony, based upon his very complete examination, that he found no evidence of any residual injury to the nerve, no evidence of anything that could cause this lady's complaint other than a limitation of motion which he described as being similar to that which Your Honor observed, which only involved flexion, the thumb across the hand, and extension of the thumb in this fashion, with full range of motion in all other directions. He concluded that she had a disability, predicated solely upon limitation of motion, of 25% loss of use of the thumb. This, in itself, is a little inconsistent but I don't quarrel with it because I am not a doctor. He said that she had a 10% limitation this way, 15% this way, he totalled the two together and came up with 25%.

But there is no testimony here that that minimal limitation with respect to the thumb could likewise be applied to the hand so as to be a percentage limitation with respect to the hand.

Now, with respect to the liabilities of the parties. I am sure that both defendants feel that this accident would fall within the category of one that occurred without negligence on the part of either, but that if there were
431 negligence, it was on the part of the other defendant.

There are two other possibilities, one of course is that the negligence, if any, was the negligence of both, concurring in bringing about a single result, or that Mr. Long had an opportunity to avoid the accident and his failure to do so constituted the sole proximate cause of the accident.

With respect to that last position, I submit that Mr. Long, as the following boat, the boat in this position, had a duty to maintain a lookout to see to it that a safe distance was maintained between the two boats; that if the lead boat, Mr. Engle, altered or changed its speed or its course, that the following boat was required to follow suit and do the same.

The Court: Now, the Engle boat was the overtaking boat at this point.

Mr. Gregg: Your Honor, I think that the only evidence to that effect was that of Miss Stull. All of the other evidence, the testimony of the two operators and the only passenger who was called, Mr. Weiss, was to the effect that for a considerable distance of time, estimated at three-quarters to a half of a mile, the two boats were proceeding along in the same position shown on the blackboard.

The Court: Mr. Long, when he was on the stand,
432 testified that the other boat was, I believe it was several hundred feet at one time.

Mr. Gregg: Yes, this is the situation, Your Honor. The boats left Washington, D. C.—

The Court: Now, I am not bothered about that. All the testimony, I think without dispute, is up to a certain

period that they were both going along, but after they left Marshall Hall—

Mr. Gregg: Yes, and this accident occurred three-quarters of a mile to a mile or something in that area, south of Marshall Hall, beyond Marshall Hall. When they left Marshall Hall initially, the Long boat left first, he got, I think he testified a matter of perhaps several hundred yards out.

The Court: My recollection is he said feet.

Mr. Gregg: Well, whatever it was, in any event he left first and the Engle boat did, for a short period of time, catch up and overtake it. From that point on which would be, say, within 300 to 500 feet of Marshall Hall and for a distance of perhaps a half a mile, the two boats proceeded along in the same relative positions shown on the diagram, so that there would not be a case of an overtaking boat, it would be a case of two boats going along more or less in formation, as two airplanes would go along.

433 Your Honor, the testimony of Mr. Weiss, who was the only passenger from either of these two boats who was called, indicated for some period of time prior to the accident the two boats had been going along with the Engle boat in front and the Long boat behind. This was also the testimony of Mr. Engle, corroborated by Mr. Long.

The Court: It is my recollection, though, that the testimony was that Mr. Long's boat was the one that was in front after they passed Marshall Hall, that it left first, and therefore that Mr. Engle's boat was the one that was in front after they passed Marshall Hall, that it left first, and therefore that Mr. Engle's boat was the one that was behind and that Mr. Engle's boat was the overtaking boat. And I am under the impression that Mr. Long's boat was going slow at a time when the Engle boat was still going fast.

Mr. Gregg: Well, I think Your Honor's impression stems solely from the testimony of Miss Stull.

The Court: No, indeed, I am going from the testimony of Mr. Long.

Mr. Gregg: I don't recall it that way, Your Honor, and I submit that even the hypothetical question which was directed to the expert contained in it the assumption that the two boats were moving along side by side and the Engle boat—

The Court: Yes, and I wondered at the time, in view of the testimony, why it didn't tell what the distance
434 was, or rather the speed was for the Long boat.

Mr. Gregg: The question assumed that both boats were going at the same speed, Your Honor.

The Court: Well, they were for awhile.

Mr. Gregg: I think that way back here a distance of three-quarters to a half mile of Marshall Hall, the two boats were in a posture where the Engle boat was overtaking, but that situation had long since ceased to be the case and for a period of half to three-quarters of a mile, the two boats were going along in the same position shown on the blackboard, both maintaining these distances and both maintaining the same speed, which of course is contrary to the testimony of the plaintiff.

The Clerk: You have had 15 minutes, Mr. Gregg.

The Court: What Mr. Long said was that, after Marshall Hall, the Long boat went first, a few hundred feet ahead of Mr. Engle. Now, I have it down here that he said a few hundred feet ahead of him, and I put this note down as he was testifying.

Mr. Gregg: Yes, Your Honor, and he also said that subsequently the Engle boat pulled ahead and they took this same relative position and traveled along at this distance—

The Court: Oh, there is no dispute about that.

Mr. Gregg: —for approximately three-quarters of a mile.

435 The Court: But since Mr. Long's boat was so far ahead of him at that place, he is bound to have been the overtaking boat.

Mr. Gregg: For a short period of time, yes, that would be back close to Marshall Hall, approximately a half a mile from the scene of the accident.

The Court: That was after leaving Marshall Hall, according to the testimony of Mr. Long.

Mr. Gregg: Yes, right immediately after leaving Marshall Hall.

The Court: No, not right after that. He said that they left Marshall Hall and they went for a half to three-quarters of a mile, and then he said that after leaving Marshall Hall that the Long boat went first a few hundred feet ahead of the Engle boat.

Mr. Gregg: Well, my understanding—

The Court: Well, let's see now about that.

Will you turn to Mr. Long's testimony.

(The reporter began looking for the testimony.)

Mr. Gregg: Your Honor, I think all the lawyers are in agreement—

The Court: Now, she is not taking down what you are saying.

436 Go back on the record for a minute.

Now, you say the lawyers' recollection is what?

Mr. Gregg: That the two boats left Marshall Hall with the Long boat ahead, that shortly thereafter the Engle boat left, that the Engle boat caught up with and passed the Long boat some distance, quite some distance prior to the accident. The two boats were traveling along in this relative position for a period of a half mile to three-quarters of a mile.

The Court: Well, I don't believe that anybody testified just exactly how long it was after the Long boat left Marshall Hall, and that he was a few hundred feet ahead of Mr. Engle, and just when they caught up and how long—

Mr. Gregg: That is right, there was no testimony just exactly how far from Marshall that they caught up with each other, but there was testimony that for a distance of half a mile to three quarters of a mile—

The Court: Is there any dispute that the Engle boat was the overtaking boat?

Mr. Gregg: Oh, yes, Your Honor. At the time of the accident, the two boats were going along side by side in this relative position.

The Court: I realize that, but there is nothing that I recall in here that tells you how long they went
437 side by side after the Engle boat caught up with the Long Boat.

Mr. Gregg: Well, Mr. Long's testimony was approximately a half mile and Mr. Engle's testimony was approximately three-quarters of a mile.

The Court: I have the business about the half or three-quarters of a mile before Mr. Long told us that he was a few hundred feet ahead of Mr. Engle.

Mr. Gregg: That is because the previous question had asked how long a period of time had the two boats been going along in the same relative positions. His answer was a half a mile.

The Court: What is your recollection?

Mr. Carr: A quarter of a mile, Your Honor, in other words after the two boats came side by side and the Engle boat pulled ahead, they were in this relative position for about a quarter of a mile before the accident occurred.

Mr. Gregg: With neither boat overtaking the other, neither boat gaining on the other, they were both traveling along at the same speed.

The Court: Well, a quarter of a mile is a very short distance, it wouldn't take him very long to get that far if the Long boat was proceeding more slowly than the other one.

Mr. Gregg: A quarter of a mile, of course, is
438 approximately 5,280 feet and a fourth of that is about 900 yards—feet, rather.

The Court: At 35 miles an hour, how fast would one go a quarter of a mile?

Mr. Gregg: Well, a vehicle moving 60 miles an hour, of

course, goes 88 feet a second, a vehicle moving 30 miles an hour goes one-half of that or 44 feet per second. 800 feet would be traversed, what would that be, 800 feet divided by 40 would be 20 minutes—

The Reporter: You mean 20 seconds?

Mr. Carr: 20 seconds.

Mr. Cramer: 20 seconds.

Mr. Gregg: I guess everybody straightened me out on that.

The Court: 20 seconds would only be a small part of a minute.

Mr. Gregg: But at least at the time neither boat was overtaking the other, they were both traveling along in the relative same position to each other.

The Court: Well, at some time certainly the Long boat was overtaken, after they left Marshall Hall.

Mr. Gregg: That is right, yes, Your Honor. Now, it is our contention that being in these relative positions to each other and both traveling at the same speed, that Mr. Long, when he saw the position of peril that Mr. Engle was in, could have cut his engine, could have turned his boat to the right or to the left and the accident of course would have been avoided. This doctrine is merely the doctrine of proximate cause and it is applicable here because Mr. Engle was, of course, in a position of peril, his boat was out of control, he could not control it, but there was a time, a period of perhaps several seconds when by the exercise of some degree of care, some action on the part of Mr. Long, the accident would have been avoided completely, either by cutting his throttle and stopping the boat or by swerving to the right or to the left, because it is clear that if the two boats continued in the same path with the Engle boat out of control and traveling 100 to 150 feet, that the two boats would have come together in a collision.

The Court: Now, Mr. Long did do something and the action he took was drastic enough to throw one of his passengers out.

Mr. Gregg: A passenger who was seated on the hull of the boat and not in the seat. But his action was too ineffective, it was too little and it was too late.

It is really not material as to why Mr. Engle's
440 boat was out of control if, after it went out of control, Mr. Long did have an opportunity to avoid the accident. If the distance separating the two boats was 100 to 150 feet, traveling at 30 miles per hour, 44 feet per second, it would take in excess of two seconds for the Engle boat to have traversed that distance.

The Court: You keep on talking about a 100 feet. I don't know who is right here, but I put it down as he said it, Mr. Long, he didn't say a hundred feet, he said a few hundred, a few hundred. I would take a few hundred to mean at least two or three hundred.

Mr. Gregg: Your Honor, his testimony was that the distance separating the two boats as they were going in this relative position was 100—

The Court: He was talking at this time about the distance between his boat and the other man's boat.

Mr. Gregg: As they were proceeding along in this position.

The Court: Well, that was before they were proceeding in that.

Mr. Gregg: Well, his testimony was that when they were proceeding in this position, that the distance separating the two boats was 100 to 150 feet. As a matter of fact,
441 Your Honor, Mr. Carr even marked this off, that is his scale, to represent 100 feet this way and 50 feet this way.

The Court: All right. Have you finished?

Mr. Gregg: No, Your Honor.

The Court: All right, go ahead.

Mr. Gregg: Now, if Mr. Long had been maintaining a proper lookout, he had at least two or three seconds to either swerve to his left or to his right and the accident could have been avoided. Even if it took him a second

to react to the impending danger, he could still have cut the throttle and the accident still could have been averted.

Mr. Cramer cites a provision of the United States Code as authority for the proposition that nothing in the rules of navigation shall exonerate any vessel from the consequences of any neglect to maintain a lookout or the neglect of any precaution required by special circumstances. This requirement to maintain a lookout, of course, is applicable to both operators.

The cases have held that where it is obvious that a collision is imminent, as this one was when the Engle boat went out of control a hundred to 150 feet away, when it is obvious that a collision is imminent in a matter of seconds between two boats unless one of the two yielded and
442 the one boat was showing no signs of having seen the other, to continue making no move except to step up the throttle or to swing astern a little at the last moment was a clear disregard of even minimum precautions. That is the case, Your Honor, of *Petition of Robertson*, 163 Fed. Supp. 242.

The case of *Curtis Bay Filling Company* holds that a vessel, even though it is privileged, must through the maintenance of proper lookout reserve for herself the ultimate responsibility or opportunity of escaping a predicament and avoiding disaster, by exercising experienced nautical judgment when it becomes apparent the burdened vessel will be unable to avoid a collision.

And again, the *United States against M. V. Worstenberg*, when safe means of avoidance of a risk of collision are obviously and readily at hand, their neglect is inexcusable. The rules of the road do not command or entitle a privileged vessel completely to ignore dangers that might arise upon her left side on the theory that she will be privileged over whatever may there be present.

Other cases hold that it is not considered to be the law that vessels can persist upon and insist upon their own right of way until a collision happens when the circum-

stances show plainly that the resulting position of
443 the vehicles will make the actual rule to be applied a
matter of doubt and where under the circumstances,
be it vessels have entire freedom of motion and an accident
results which without any danger or inconvenience could
have been avoided, each vessel failing to take precautions
should be held to its share of responsibility in the matter.

The Court: I think I took some of your time, so you can
have a few minutes more.

Mr. Gregg: Thank you. Now, the cases I just cited are
really just variations of the cases dealing with proximate
cause.

We urge the Court to apply the logic of the cited
authorities and to hold that Mr. Long's failure was a sole
proximate cause of the accident, that the judgment if any
should be against him alone or at least in favor of my
client on the cross-claim.

Now, the primary thrust of our position, however, is
that plaintiff has failed to establish, by the reasonable pre-
ponderance of the evidence, that Mr. Engle was negligent.
The evidence establishes here that an accident occurred in-
volving the two boats. The accident occurred when the
Engle boat swerved sharply out of control to its right and
traveled a distance of 100 to 150 feet before coming
444 in contact with the Long boat.

Plaintiff's version of the accident that the Engle
boat was overtaking and then cut sharply in front is her
version alone, it is completely contradicted by both the
operators and by the only party, who was another pas-
senger. As a matter of fact, even her version of the acci-
dent was not even included in the hypothetical question
directed to the expert. We must therefore assume that even
the plaintiff does not believe that her version of the acci-
dent is the accurate one.

The fact of proving an accident alone is not proof of
negligence. And both Mr. Nabb and the other expert,
Mr. Hildebrand conceded that there could be many different

causes for this accident other than negligence; striking a submerged article, a mechanical defect, a weight shift, are some examples. None of these were affirmatively excluded by the plaintiff's evidence. Her evidence is solely that an accident occurred, that the Engle boat went out of control, went out of control for one of many different reasons, none of which has been established by competent evidence.

We submit to Your Honor that there is no competent proof of negligence on the part of Mr. Engle to permit or to justify or warrant a judgment against him.

445 Now, there is in the law, both in the law applicable to automobiles and the law applicable to boats, the doctrine of unavoidable accident, which is one that where an accident occurs that is an unusual event, it has not been proven to have been caused by specific negligence, that the accident is unavoidable and there is no liability on the part of the defendants.

This law is applicable both with respect to boats and with respect to automobiles and I submit to Your Honor that the evidence here would justify a conclusion that the Engle boat went out of control for some unknown reason, completely unrelated to negligence on his part. The testimony is that he was looking ahead, he was operating his boat at a reasonable speed, that he was competent to operate the boat, there is no evidence that anything he did or failed to do that caused or created this accident, that he was the unfortunate victim of the water that caused his boat to go out of control for a reason that he does not know, Mr. Long doesn't know, the plaintiff doesn't know, and which nobody knows. I submit to Your Honor that that is a mighty thin reason upon which to predicate a claim of negligence upon the part of the defendant.

Now, the clear weight of the evidence here, we think, establishes that both boats were traveling along at a
446 reasonable distance and at a reasonable speed, that the accident causing Mr. Engle's boat to go out of

control was an unfortunate event, that it was not caused or created by negligence on his part.

Thank you.

The Court: Mr. Cramer, do you want to say anything more?

Mr. Cramer: No, Your Honor.

The Court: Miss Deeds, I would like for you to go to Mr. Long's testimony, just go about midway and read me what you have and maybe I can orient my notes with yours.

(The record was read by the reporter.)

The Court: Go back on the record.

What is your recollection, Mr. Carr, of what Mr. Long said about who was ahead of who and how they were going and how far they traveled before this collision occurred?

Mr. Carr: Taking his entire testimony, it is my recollection that they stopped at Marshall Hall for a few moments, that the Long boat started up and probably got several hundred feet ahead on their way south, that the other boat was facing the wrong direction and had to swing around, had to come around to follow it; that the accident occurred about three-quarters of a mile south of Marshall Hall; that during this period of time and shortly after
447 leaving Marshall Hall, they were on a converging course, several hundred feet between them; that sometime during this time, as they were getting closer together, the boats came abreast, exact position unknown; about a quarter of a mile prior to when the accident occurred, they got into the relative position that we find them on the board now of about 100 feet apart and 50 foot ahead and behind and that they maintained this position for about a quarter of a mile prior to the one boat going out of control.

That is my recollection of everything between Marshall Hall and the time of the accident.

The Court: I think that Mr. Engle was negligent and I will find for the plaintiff as against him.

STATEMENT

TELEPHONE JA 2-1021

ROBERT G. BULLOCK, M. D.
2221 N. BUCHANAN STREET
ARLINGTON 7, VIRGINIA

June 1, 1963

Team Stull
323 So. Vintch St.
Arl 4, Va. Apt #6

FOR PROFESSIONAL SERVICES:

X ray 25 May 10.00

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PT - Prothrombin Time
SP - Special Procedure
UR - Urinalysis
XR - X-Ray or Fluoroscopy

JACKSON E-3133

Kathryn R. Lewis, M.D.

NEUROLOGY

2221 NORTH BUCHANAN STREET
ARLINGTON 7, VIRGINIA

May 18, 1964

Miss Emogene Stull
700 South Court House Road
Apt. 207
Arlington, Virginia

FOR PROFESSIONAL SERVICES

May 15, 1964 Complete neurological exam. \$40.00

RECEIPT SENT UPON REQUEST

NORTHERN VIRGINIA DOCTORS HOSPITAL
601 S. CARLYN SPRING ROAD
ARLINGTON, VIRGINIA
JACKSON 4-8100

STULL, EUGENE I. (JEAN) N24A 10312

| MEMO. | DATE | EXPLANATION | CHARGES | CREDITS | BAL. DUE |
|-------|--------|-------------|----------|---------|-----------|
| 1 | AUG-66 | ROOM-BOARD | \$ 24.00 | | |
| 2 | AUG-66 | TELEPHONE | \$ 1.00 | | |
| 3 | AUG-66 | MESSUPP-I | \$ 0.11 | | |
| 4 | AUG-66 | PHARMACY | \$ 0.25 | | |
| 5 | AUG-66 | PHARMACY | \$ 1.00 | | |
| 6 | AUG-66 | PHARMACY | \$ 1.00 | | |
| 7 | AUG-66 | MESSUPP-I | \$ 0.10 | | |
| 8 | AUG-66 | LABATORY | \$ 2.00 | | |
| 9 | AUG-66 | LABATORY | \$ 5.00 | | |
| 10 | AUG-76 | ROOM-BOARD | \$ 24.00 | | \$ 34.76 |
| 11 | AUG-76 | TELEPHONE | \$ 1.00 | | |
| 12 | AUG-76 | ANESTHESIA | \$ 40.00 | | |
| 13 | AUG-76 | PHARMACY | \$ 11.00 | | |
| 14 | AUG-76 | OPER-ROOM | \$ 25.00 | | |
| 15 | AUG-76 | RECU-ROOM | \$ 5.00 | | |
| 16 | AUG-76 | MESSUPP-I | \$ 3.00 | | |
| 17 | AUG-76 | PHARMACY | \$ 1.00 | | |
| 18 | AUG-76 | PHARMACY | \$ 0.25 | | |
| 19 | AUG-76 | LABATORY | \$ 3.00 | | |
| 20 | AUG-86 | ROOM-BOARD | \$ 24.00 | | \$ 101.01 |
| 21 | AUG-86 | TELEPHONE | \$ 1.00 | | |
| 22 | AUG-86 | MESSUPP-I | \$ 0.50 | | |
| 23 | AUG-86 | MESSUPP-I | \$ 0.25 | | |
| 24 | AUG-86 | PHARMACY | \$ 0.25 | | \$ 207.01 |

LAST BALANCE IS AMOUNT DUE UNLESS OTHERWISE INDICATED

NORTHERN VIRGINIA DOCTORS HOSPITAL
601 S. CARLYN SPRING ROAD
ARLINGTON, VIRGINIA
JACKSON 4-8100

STULL, EUGENE I. N24A 10312

| MEMO. | DATE | EXPLANATION | CHARGES | CREDITS | BAL. DUE |
|-------|--------|-------------|----------|----------|-----------|
| 1 | | | | | |
| 2 | AUG-86 | PHARMACY | \$ 2.00 | | |
| 3 | AUG-86 | LABATORY | \$ 10.00 | | |
| 4 | AUG-96 | PAID | | \$ 17.00 | \$ 219.01 |
| 5 | | | | | |
| 6 | | | | | |
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| 24 | | | | | |

This is not a bill, but a copy of your statement for your records.

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ARLINGTON HOSPITAL

3127 NORTH 14th STREET
ARLINGTON 5, VIRGINIA
JA 4-5900 EXT 17 & 18

DATE 12-1-58

6031, Jan 2,
323 E. Valley St.,
Arlington, Virginia

NEAREST OF KIN

EMPLOYED BY ADDRESS

PHONE

PHONE

| FAMILY INCOME CERTIFICATION | | EMERGENCY ROOM CASE NO. <u>2-1</u> | | HOSPITAL NO. <u>154</u> | | TIME OF INJURY <u>12:00</u> | |
|--|--|--|--|--|--|--|--|
| <input type="checkbox"/> ABOVE \$4,000 <input type="checkbox"/> BELOW \$4,000 <input type="checkbox"/> ABOVE \$8,000 <input type="checkbox"/> BELOW \$8,000 | | <input type="checkbox"/> ABOVE \$4,000 <input type="checkbox"/> BELOW \$4,000 <input type="checkbox"/> ABOVE \$8,000 <input type="checkbox"/> BELOW \$8,000 | | <input type="checkbox"/> ABOVE \$4,000 <input type="checkbox"/> BELOW \$4,000 <input type="checkbox"/> ABOVE \$8,000 <input type="checkbox"/> BELOW \$8,000 | | <input type="checkbox"/> ABOVE \$4,000 <input type="checkbox"/> BELOW \$4,000 <input type="checkbox"/> ABOVE \$8,000 <input type="checkbox"/> BELOW \$8,000 | |
| TYPE OF COVERAGE | | | | | | | |
| <input type="checkbox"/> MEDICAL <input type="checkbox"/> SURGICAL <input type="checkbox"/> DENTAL <input type="checkbox"/> OPTOMETRIC <input type="checkbox"/> PODIATRIC <input type="checkbox"/> PHYSICIAN <input type="checkbox"/> NURSE <input type="checkbox"/> X-RAY <input type="checkbox"/> LABORATORY <input type="checkbox"/> OTHER | | | | | | | |
| TOTAL CHARGES \$1 | | TOTAL CREDITS \$2 | | DATE | | BALANCE DUE | |
| 10.00 | | | | DEC 8 58 | | 10.00 | |
| OTHER SERVICES | | | | | | | |
| ANESTHESIA | | | | | | | |
| PATHOLOGY | | | | | | | |
| RADIOLOGY | | 1257 10.00 | | | | | |
| MEDICAL & SURGICAL SUPPLIES | | | | | | | |
| OPERATING ROOM | | | | | | | |
| DELIVERY ROOM | | | | | | | |
| RECOVERY ROOM | | | | | | | |
| PHARMACY | | | | | | | |
| LABORATORY | | | | | | | |
| X-RAY | | | | | | | |
| DENTAL | | | | | | | |
| OPTOMETRIC | | | | | | | |
| PODIATRIC | | | | | | | |
| PHYSICIAN | | | | | | | |
| NURSE | | | | | | | |
| OTHER | | | | | | | |
| CREDITS | | | | | | | |
| ANESTHESIA | | | | | | | |
| PATHOLOGY | | | | | | | |
| RADIOLOGY | | | | | | | |
| MEDICAL & SURGICAL SUPPLIES | | | | | | | |
| OPERATING ROOM | | | | | | | |
| DELIVERY ROOM | | | | | | | |
| RECOVERY ROOM | | | | | | | |
| PHARMACY | | | | | | | |
| LABORATORY | | | | | | | |
| X-RAY | | | | | | | |
| DENTAL | | | | | | | |
| OPTOMETRIC | | | | | | | |
| PODIATRIC | | | | | | | |
| PHYSICIAN | | | | | | | |
| NURSE | | | | | | | |
| OTHER | | | | | | | |
| TOTAL CHARGES | | | | | | | |
| LESS: INSURANCE | | | | | | | |
| LESS: DEFERRED TO PAY | | | | | | | |
| LESS: OTHER CREDITS | | | | | | | |
| LESS: PAID BY PATIENT | | | | | | | |
| BALANCE DUE TO SUBJECT | | | | | | | |
| AGREEMENT: I HEREBY AGREE TO PAY FOR ALL HOSPITAL SERVICES TO BE RENDERED TO THE ABOVE PATIENT. BILL TO: ADDRESS: PHONE: PATIENTS NAME <u>6031, Jan 2,</u> ADDRESS: PHONE: <u>12-6-58</u> PLEASE DETACH HERE, AND RETURN THIS STUB WITH YOUR REMITTANCE. | | | | | | | |

THIS IS NOT A 30 DAY ACCOUNT

All Out Patient services are due and payable at the time they are rendered. At the time of your discharge as an Out Patient, there may have been other charges not known to the Cashier; (such as Lab, X-Ray, etc.) if so, they will be billed later.

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PHYSICAL MEDICINE
AND REHABILITATION

TELEPHONE
JEFFERSON 3-9033

JOSEPHINE J. BUCHAN, N. M. D.

PROFESSIONAL BUILDING
200 LITTLE FALLS STREET
FALLS CHURCH, VIRGINIA

November 5, 1965

Miss Jean Stull
323 S. Veitch Street
Srlington, Virginia

\$165.00

| | |
|---|---------|
| Examination and supervision of treatment----- | \$15.00 |
| 15 Treatments @ \$10.00 ea.----- | 150.00 |
| 4 Recheck examinations @ \$5.00 ea.----- | 20.00 |

Exam.: 9/7/62
Treat: 9/7;9/10;9/13;9/18;9/21/62;7/1/7/3;7/5;7/8;
7/9;7/10;9/4;9/6;9/11/63 9/6/63
R.C.- 9/2/62;7/1;7/5;9/4/64

Payment 9/7/64 ----- \$20.00

EMERGENCY ROOM

ARLINGTON HOSPITAL

16th and North Edison Sts.

Arlington, Va.

Phone JACKSON 4-5900

RECEIPT

Date 11-11-1965

Received of

Jean Stull

Address

5001 Seminary RdAlexandria, VAFOR ACCOUNT
OF PATIENTSelf

ROOM NO.

HOSPITAL NO.

O. P. O.

Nineand00

DOLLARS

\$ 9.00☐

CASH

☐

DRAFT

☒

CHECK

☐

MONEY ORDER

ARLINGTON HOSPITAL

ER 06643

By

J. J. York

Remarks

Out Pat. X-rayRd. 11-11-65

CAPITAL BUSINESS FORMS, INC., EM. 2-7373, WASHINGTON, D. C.

FORM 279

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Northern Virginia Doctors Hospital Corp.
601 S. Carlyn Springs Rd.
Arlington, Va.
JACKSON 4-6100

RECEIPT

Date 8-9 1963

Received of Chapman's Skull

Address 223 S. Veale St

Ad 4, Va

FOR ACCOUNT

OF PATIENT Jane

ROOM NO.

HOSPITAL NO.

10312

O. P. O.

DOLLARS

DEBIT

☐ CASH

☒ CHECK

MONEY ORDER

12.00

NORTHERN VIRGINIA DOCTORS HOSPITAL

33380

By CV

Remarks TVP

2.00

Arrest

15.00

CAPITAL SUPPLEMENT FORM, INC., 200 E. 10TH, WASHINGTON, D. C. FORM 28



Prescription is being Carefully and Accurately
transcribed by a Registered Pharmacist. It will be
completed in as short a time as possible and printed.

NO 258450
PLEASE PRESENT THIS CHECK WHEN
CALLING FOR YOUR MEDICINE

Vulams

aid

*Paid
from
Skull*

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from the original bound volume

FORM 108

PEOPLES
DRUG STORES

For _____
 Street No. _____
 City _____
 State _____
 Zip _____
 Name Stull
 Address _____
 Wait ☐ Will Call ☐ Deliver ☒
 HOW MANY PRESCRIPTIONS? 1

R 0220 DR
 R 0220 II

A 305133

R Number Price

PRESCRIPTION
 STORES

Total 220

APR 63

Patient _____
 Doctor _____
 YC _____ ION _____

A 305133

PEOPLES
DRUG STORES
 INC

AND SUBSIDIARY CORPORATIONS

FOR COMPLETE DRUG STORE SERVICE

CAUTION: KEEP THIS AND OTHER MEDICATIONS OUT OF REACH OF CHILDREN

SEE IMPORTANT NOTICE ON BACK

Prescriptions

For Eugene I. Stull

Address _____

Wait. \$ 1.40

2-N

Thomas A. Moskey

PRESCRIPTION PHARMACIST

PHONE JA 4-7722

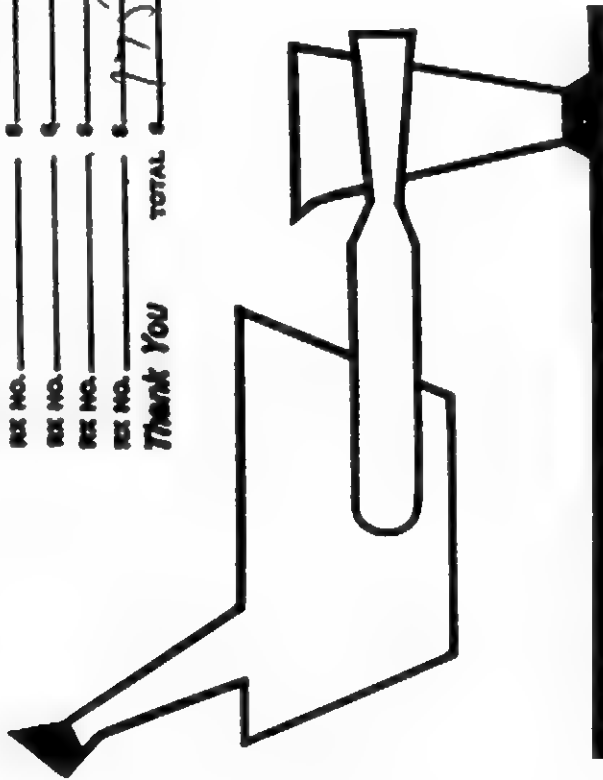
LEE HWY. AT GLEBE RD. ARLINGTON, VA.



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SAVE FOR TAX OR INSURANCE RECORD

NAME _____ DATE _____
 ADDRESS _____
 DR. _____
 RX NO. _____
 RX NO. _____
 RX NO. _____
 RX NO. _____
 RX NO. _____
 Thank You TOTAL \$ 7.75



BELL DRUG STORE

Arlington's Health And Beauty Headquarters
 2815 COLUMBIA PIKE ARLINGTON 4, VA.

JA 7-4443

Rings the "Bell" for Free Fast Delivery
 OPEN TILL MIDNITE

FORM 103

For _____
 Address _____
 Dr. _____
 To be cal _____
 To be ten _____
 SAVE

Still
 (TO BE FILLED IN BY SALES-PERSON)
 Name *Miss Still*
 Address _____
 HOW MANY PRESCRIPTIONS? _____
E 219621
 (TO BE FILLED IN BY PHARMACIST)

Name _____
 Address _____
 Dr. Name *Manderson*
 Price _____
 HOW MANY PRESCRIPTIONS? _____

**E 219621**

YOUR PRESCRIPTION

FROM

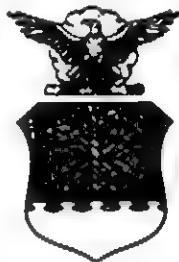
PEOPLES
DRUG STORES
 INC

AND SUBSIDIARY CORPORATIONS
 FOR COMPLETE DRUG STORE SERVICE
 CAUTION: KEEP THIS AND OTHER MEDICATIONS
 OUT OF REACH OF CHILDREN.

SEE IMPORTANT NOTICE ON BACK

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United States



of America



DEPARTMENT OF THE AIR FORCE

HEADQUARTERS, U. S. AIR FORCE
WASHINGTON, D. C.5 November 1965
(Date)

I HEREBY CERTIFY that the attached document is a true and correct extract of the leave records pertaining to Eugene I. Stull; for the period 7 July 1964 through 23 October 1965, which are in my legal custody.



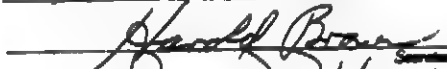

MAE H. BEACH
Hq, Civilian Payroll
Departmental Certifying Officer

I HEREBY CERTIFY that Mae H. Beach, who
as the issuing certificate, is the Hq, Civilian Payroll, Departmental Certifying
Officer, and
the contents of this document as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, HAROLD BROWN

Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the city of Washington.

this 5th day of November 1965


Secretary of the Air Force.
By 
Deputy Administrative Assistant.

AF FORM 880
AUG 60

PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL STOCK IS EXHAUSTED.

GPO 000000

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11/4/65

The following is a true extract of the leave records of Miss Eugene I. Stall on file for the period from 17 July 1964 through 23 October 1965.

| <u>Date</u> | <u>Annual (Hours)</u> | <u>Sick (Hours)</u> | <u>Hourly Rate</u> |
|-------------|-----------------------|---------------------|--------------------|
| 7/31/64 | 8 | - | \$2.56 |
| 8/13/64 | - | 8 | |
| 8/28/64 | - | 8 | |
| 9/28/64 | 8 | - | |
| 9/30/64 | 8 | - | |
| 10/6/64 | 2 | - | |
| 10/9/64 | 1 | - | |
| 11/27/64 | 8 | - | |
| 12/21/64 | 1 | - | |
| 12/24/64 | 8 | - | |
| 12/28/64 | 8 | - | |
| 1/13/65 | 1 | - | |
| 2/4/65 | 2 | - | |
| 2/23/65 | - | 5 | |
| 3/3-4/65 | - | 16 | |
| 3/5/65 | 2 | - | |
| 3/11/65 | 3 | - | |
| 3/16/65 | 2 | - | |
| 3/18/65 | 1 | - | |
| 3/25/65 | 1 | - | |
| 3/23/65 | 1 | - | |
| 4/16/65 | 8 | - | |
| 4/19-21/65 | 24 | - | |
| 4/29/65 | - | 8 | |
| 5/7/65 | 2 | - | |
| 5/10/65 | 8 | - | |
| 5/13/65 | 1 | - | |
| 5/21/65 | 1 | - | |
| 6/14-17/65 | 32 | - | |
| 7/1-2/65 | 16 | - | \$2.64 |
| 7/6-8/65 | 24 | - | |
| 7/19/65 | 7 | - | |
| 7/29/65 | - | 4 | |
| 7/30/65 | 1 | - | |
| 8/10/65 | 2 | - | |
| 8/13/65 | 1 | 2 | |
| 8/24/65 | - | 8 | |
| 9/3/65 | 8 | - | |
| 9/24/65 | 8 | - | |
| 9/28/65 | 8 | - | |
| 10/7/65 | 8 | - | |
| 10/13/65 | 3 | - | \$2.74 |

Mae H. Beach

MAE H. BEACH
DEPARTMENTAL CERTIFYING OFFICER
HQS, USAF

Copy to: Miss Stall

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United States



of America



DEPARTMENT OF THE AIR FORCE
HEADQUARTERS, U. S. AIR FORCE
WASHINGTON, D. C.

5 November 1965

HEREBY CERTIFY that the attached document is a true and correct extract of the leave records pertaining to Eugene I. Stull; for the period 2 September 1963 through 18 July 1964, which are in my legal custody.

Mae H. Beach

MAE H. BEACH
Hq, Civilian Payroll
Departmental Certifying Officer

HEREBY CERTIFY that Mae H. Beach, who
is the following certificate, is the Hq, Civilian Payroll Departmental Certifying
Officer, and
that this certificate, as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, HAROLD BROWN

Secretary of the Air Force, have hereunto caused the seal of the Department of the Air Force to be affixed and my name to be subscribed by the Administrative Assistant to the Secretary of the Department, at the city of Washington,

this 5th day of November, 1965

Harold Brown
Secretary of the Air Force.
By *Joseph L. Harker*
Deputy Administrative Assistant.

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The Following is a true extract of the leave records of Miss Eugene I. Stall on file for the period from 29 September 1963 through 18 July 1964.

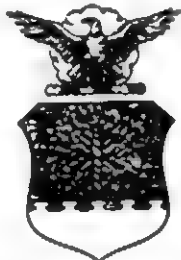
| <u>Date</u> | <u>Annual Lv(Hours)</u> | <u>Sick Lv(Hours)</u> | <u>Hourly Rate</u> |
|-----------------|-------------------------|-----------------------|--------------------|
| 11/14/63 | 8 | - | \$2.28 |
| 12/4/63 | 2 | - | |
| 12/5/63 | 8 | - | |
| 12/13/63 | 4 | - | |
| 12/23/63-1/4/64 | 64 Plus 2 Holidays | - | |
| 1/20/64 | 1 | - | \$2.34 |
| 1/21 thru 24/64 | 32(Adv of 25 hours) | - | |
| 1/27/64 | 1 1/24 -30/64 | - | |
| 1/28-29/64 | 16 | - | |
| 1/30/64 | 2 | - | |
| 4/11/64 | 1 | - | |
| 4/27/64 | 2 | - | |
| 5/8/64 | 3 | - | |
| 5/15/64 | 1 | - | |
| 5/26/65 | 8 | - | |
| 5/27/65 | 8 | - | |
| 5/28/64 | - | 2 | |
| 6/17/64 | 2 | - | |
| 6/29/64 | - | 1 | |
| 7/15/64 | - | 8 | \$2.56 |
| 7/16/64 | - | 2 | |

Price H Reed

MAE H. BEACH
DEPARTMENTAL CERTIFYING OFFICER
HQS, USAF

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United States



of America



DEPARTMENT OF THE AIR FORCE

HEADQUARTERS, U. S. AIR FORCE
WASHINGTON D. C.5 November 1965
(Date)

HEREBY CERTIFY that the attached document is a true and correct extract of the leave records pertaining to Emogene I. Stull; for the period 1 August 1962 through 28 September 1963, which are in my legal custody.

Mae H. Beach
MAE H. BEACH
Hq, Civilian Payroll
Departmental Certifying Officer

HE CERTIFY that Mae H. Beach, who
the following certificate, is the Hq, Civilian Payroll Departmental Certifying
Officer, and
this certification as such, full faith and credit are and ought to be given.

IN TESTIMONY WHEREOF I, HAROLD BROWN
Secretary of the Air Force, have hereunto caused the seal of the Department of the
Air Force to be affixed and my name to be subscribed by the Administrative Assistant
to the Secretary of the Department, at the city of Washington.

this 5th day of November 1965

Harold Brown Secretary of the Air Force.
By *Joseph P. Harker* Deputy Administrative Assistant.

AF FORM 800 60

PREVIOUS EDITION OF THIS FORM WILL BE USED UNTIL STOCK IS EXHAUSTED.

GPO 550250

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The following is a true extract of the leave records of Miss Emogene I. Stull on file in my office for the period from August 13, 1962 to September 28, 1963.

| <u>Date</u> | <u>Annual (Hours)</u> | <u>Sick (Hours)</u> | <u>Hourly Rate</u> |
|-------------|-----------------------|---------------------|--------------------|
| 8/13-15/62 | - | 24 | \$2.09 |
| 8/17/62 | - | 3 | |
| 8/20/62 | - | 8 | |
| 8/23/62 | - | 2 | |
| 8/27/62 | - | 1 | |
| 9/10/62 | - | 3 | |
| 9/13/62 | - | 3 | |
| 9/14/62 | - | 3 | |
| 9/18/62 | - | 2 | |
| 9/20/62 | - | 1 | |
| 9/21/62 | - | 3 | |
| 10/10/62 | - | 8 | |
| 10/22-26/62 | 40 | - | 2.20 |
| 10/31/62 | - | 5 | |
| 11/21/62 | 2 | - | |
| 11/23/62 | 8 | - | |
| 12/26-28/62 | 24 | - | |
| 2/4/63 | - | 4 | |
| 2/5/63 | - | 8 | |
| 2/12/63 | - | 8 | |
| 2/19&20/63 | - | 16 | |
| 3/7/63 | 2 | - | |
| 3/29/63 | - | 8 | |
| 4/4/63 | 8 | - | |
| 4/22/63 | 8 | - | |
| 4/26/63 | 8 | - | |
| 5/1-2/63 | 16 | - | |
| 5/3/63 | - | 8 | |
| 5/28/63 | 1 | - | |
| 5/29/63 | - | 4 | |
| 6/13-14/63 | - | 16 | |
| 7/1/63 | - | 4 | 2.28 |
| 7/2/63 | 6 (s) | 2 | |
| 7/3/63 | 2 | - | |
| 7/5/63 | 3 | - | |
| 7/15/63 | 2 | - | |
| 7/16/63 | 1 | - | |
| 7/17/63 | 1 | - | |
| 7/18/63 | 1 | - | |
| 7/31/63 | - | 2 | |
| 8/7-16/63 | - | 64 (Adv) | |
| 8/19-21/63 | - | 24 (Adv) | |

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| <u>Date</u> | <u>Annual (Hours)</u> | <u>Sick (Hours)</u> | <u>Hourly Rate</u> |
|-------------|-----------------------|---------------------|--------------------|
| 9/10/63 | 8 | - | |
| 9/13/63 | 2 (s) | - | |
| 9/16/63 | 8 | - | |

Mae H. Beach

MAE H. BEACH
Departmental Certifying Officer
Hq USAF

Copy to: Miss Stull

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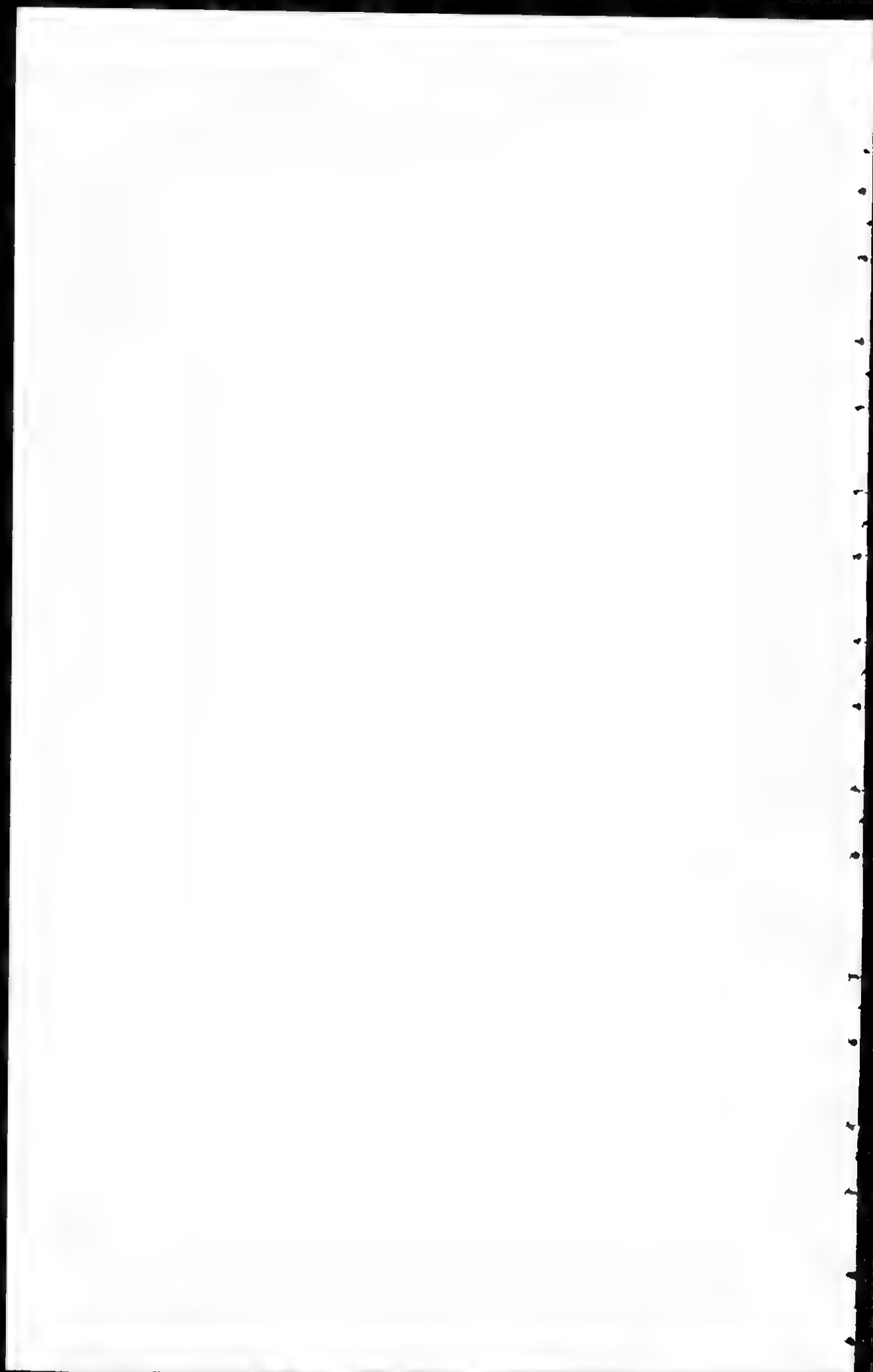
SECTION 2 - MORTALITY

Table 2-1. Abridged Life Tables for Total, Male, and Female
Population: United States, 1960

(Includes Alaska and Hawaii)

| AGE INTERVAL | PROPORTION DYING | OF 100,000 BORN ALIVE | | STATIONARY POPULATION | | AVERAGE REMAINING LIFE |
|---|--|--|----------------------------------|-----------------------|--|--|
| Period of life between two exact ages stated in years | Proportion of persons alive at beginning of age interval dying during interval | Number living at beginning of age interval | Number dying during age interval | In the age interval | In this and all subsequent age intervals | Average number of years of life remaining at beginning of age interval |
| (1) | (2) | (3) | (4) | (5) | (6) | (7) |
| x to x+n | q_x | l_x | d_x | l_x | L_x | e_x |
| TOTAL | | | | | | |
| 0-1 | 0.0081 | 100,000 | 8,008 | 97,703 | 6,973,768 | 69.7 |
| 1-5 | .0043 | 97,384 | 4,17 | 388,569 | 6,676,008 | 70.4 |
| 5-10 | .0024 | 96,977 | 236 | 684,852 | 6,487,480 | 66.9 |
| 10-15 | .0022 | 96,741 | 215 | 683,207 | 6,003,230 | 62.1 |
| 15-20 | .0046 | 96,526 | 441 | 681,807 | 5,880,031 | 57.2 |
| 20-25 | .0081 | 96,085 | 780 | 678,027 | 5,058,634 | 52.6 |
| 25-30 | .0066 | 95,305 | 629 | 670,201 | 4,389,437 | 47.7 |
| 30-35 | .0081 | 94,676 | 764 | 673,354 | 4,083,486 | 43.0 |
| 35-40 | .0117 | 94,107 | 1,097 | 667,264 | 3,810,962 | 39.4 |
| 40-45 | .0184 | 93,010 | 1,708 | 661,071 | 3,142,988 | 33.8 |
| 45-50 | .0283 | 91,302 | 2,612 | 650,268 | 2,641,913 | 29.4 |
| 50-55 | .0482 | 88,690 | 4,280 | 633,512 | 2,331,647 | 25.2 |
| 55-60 | .0872 | 84,410 | 7,378 | 609,216 | 1,798,166 | 21.3 |
| 60-65 | .1628 | 77,032 | 12,597 | 574,807 | 1,368,899 | 17.6 |
| 65-70 | .2469 | 64,435 | 15,897 | 509,900 | 1,013,008 | 14.3 |
| 70-75 | .3227 | 48,538 | 15,646 | 370,815 | 688,008 | 11.3 |
| 75-80 | .3866 | 32,892 | 12,578 | 201,508 | 434,187 | 9.7 |
| 80-85 | .4674 | 20,314 | 9,500 | 108,471 | 212,681 | 9.4 |
| 85 and over | 1.0000 | 12,817 | 12,817 | 68,210 | 68,210 | 6.8 |
| MALE | | | | | | |
| 0-1 | 0.0086 | 100,000 | 8,298 | 97,402 | 6,927,768 | 69.6 |
| 1-5 | .0047 | 97,084 | 454 | 387,187 | 6,560,348 | 67.6 |
| 5-10 | .0028 | 96,630 | 270 | 682,332 | 6,179,179 | 63.9 |
| 10-15 | .0028 | 96,360 | 268 | 681,086 | 5,880,847 | 60.1 |
| 15-20 | .0084 | 95,091 | 799 | 678,227 | 5,309,762 | 54.2 |
| 20-25 | .0089 | 94,292 | 847 | 675,181 | 4,730,836 | 49.6 |
| 25-30 | .0087 | 93,445 | 814 | 670,885 | 4,388,404 | 46.0 |
| 30-35 | .0100 | 92,631 | 928 | 666,659 | 3,784,569 | 40.6 |
| 35-40 | .0144 | 91,703 | 1,320 | 661,078 | 3,318,010 | 36.7 |
| 40-45 | .0229 | 90,383 | 2,085 | 653,643 | 2,894,832 | 31.2 |
| 45-50 | .0376 | 88,298 | 3,342 | 639,179 | 2,404,388 | 26.9 |
| 50-55 | .0625 | 84,956 | 5,318 | 617,370 | 1,984,111 | 22.8 |
| 55-60 | .0986 | 79,638 | 7,860 | 586,268 | 1,547,236 | 19.2 |
| 60-65 | .1360 | 71,778 | 9,849 | 543,730 | 1,161,266 | 15.9 |
| 65-70 | .1888 | 61,929 | 11,698 | 489,019 | 817,358 | 12.9 |
| 70-75 | .2808 | 50,231 | 14,187 | 375,086 | 539,319 | 10.2 |
| 75-80 | .3644 | 36,044 | 13,339 | 256,718 | 303,458 | 7.9 |
| 80-85 | .4468 | 22,705 | 10,215 | 144,160 | 168,160 | 6.0 |
| 85 and over | 1.0000 | 12,363 | 12,363 | 68,838 | 68,838 | 6.8 |
| FEMALE | | | | | | |
| 0-1 | 0.0086 | 100,000 | 8,298 | 97,402 | 7,314,886 | 73.1 |
| 1-5 | .0039 | 97,760 | 378 | 390,058 | 7,216,838 | 73.8 |
| 5-10 | .0021 | 97,382 | 200 | 686,968 | 6,888,797 | 70.1 |
| 10-15 | .0016 | 97,182 | 159 | 686,434 | 6,340,831 | 66.3 |
| 15-20 | .0027 | 97,023 | 260 | 686,410 | 5,888,087 | 60.4 |
| 20-25 | .0038 | 96,764 | 357 | 682,808 | 5,370,887 | 56.5 |
| 25-30 | .0046 | 96,407 | 430 | 681,001 | 4,887,788 | 50.7 |
| 30-35 | .0052 | 96,077 | 500 | 678,488 | 4,408,781 | 46.9 |
| 35-40 | .0060 | 95,577 | 581 | 674,811 | 3,988,798 | 41.2 |
| 40-45 | .0140 | 94,996 | 1,328 | 669,888 | 3,453,385 | 36.5 |
| 45-50 | .0211 | 93,668 | 1,968 | 661,368 | 2,983,887 | 31.0 |
| 50-55 | .0318 | 91,700 | 2,887 | 649,549 | 2,532,489 | 27.6 |
| 55-60 | .0469 | 88,813 | 4,164 | 633,170 | 2,178,140 | 23.5 |
| 60-65 | .0723 | 84,650 | 6,082 | 608,888 | 1,840,970 | 19.8 |
| 65-70 | .1083 | 78,568 | 8,446 | 570,984 | 1,533,974 | 18.9 |
| 70-75 | .1682 | 69,122 | 11,608 | 500,688 | 1,188,988 | 14.4 |
| 75-80 | .2808 | 57,514 | 16,263 | 381,873 | 842,888 | 9.4 |
| 80-85 | .4271 | 41,251 | 17,768 | 267,876 | 580,888 | 6.4 |
| 85 and over | 1.0000 | 24,001 | 24,001 | 188,947 | 188,947 | 3.0 |

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BRIEF FOR APPELLEE STULL

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20113

ROBERT I. ENGEL, *Appellant*,

v.

EMOGENE I. STULL AND THOMAS LONG, *Appellees*.

Appeal From The United States District Court
For The District Of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 16 1966

Nathan J. Paulson
CLERK

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Attorneys for Appellee Stull

STATEMENT OF QUESTIONS PRESENTED

1. Did substantial evidence exist to support the court's finding that appellant was negligent?
2. Was the subject of the causation of the boating accident in question, within the common knowledge of the Trial Judge?
3. Was there not sufficient evidence to support the trial court's award of damages?
4. Did the trial court conduct a fair trial?

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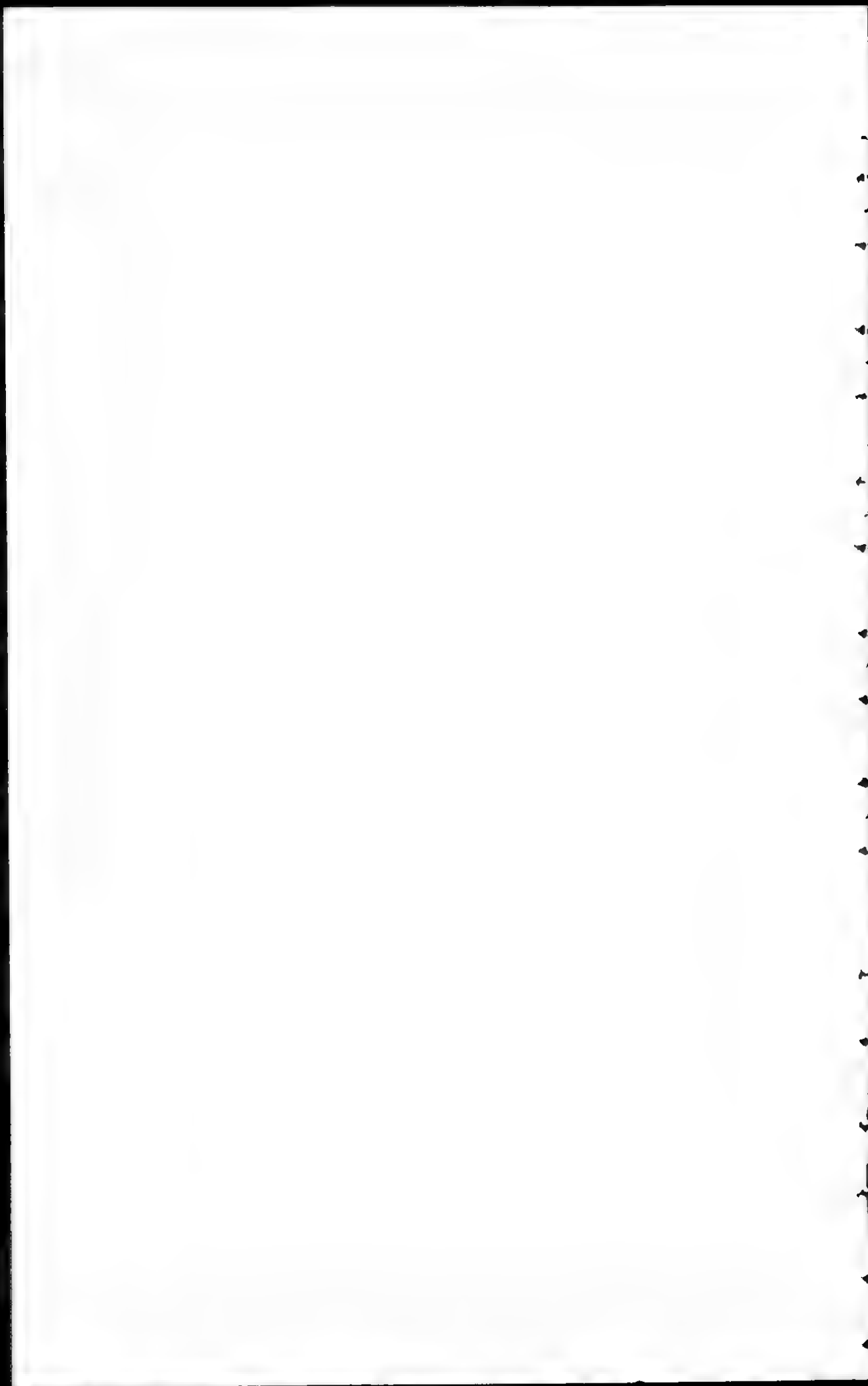
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20113

ROBERT I. ENGEL, *Appellant*,

v.

EMOGENE I. STULL AND THOMAS LONG, *Appellees*.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEE STULL

COUNTER STATEMENT OF THE CASE

On August 12, 1962, opposite Fort Belvoir on the Potomac River, appellee Stull, a guest and passenger in a boat operated by appellee Long, became the victim of a two-boat collision (J.A. p. 30). This occurred when appellant Engle, who was operating his boat to the left and forward of the Long boat, hit a wake and lost control of his boat. The Engle boat veered to the right and struck bow-on into the side of the Long boat. (J.A. p. 32)

On the day in question, the Long and Engle boats met at Marshall Hall where they stopped for a few minutes (J.A. p. 31), and passed cans of beer. (J.A. p. 253) Appellee Long's speed boat, occupied by seven passengers, and containing a 250 horsepower motor, pulled off first, continuing down river. Appellant Engle's boat, which contained a 230 horsepower motor (J.A. p. 93) and was occupied by only three passengers followed. Appellee Stull described at trial what occurred next. "I was watching Mr. Engle's boat behind us. I could see his boat coming up and it was skipping along the water, actually leaving the water at certain points." "He (appellant) came up on our left side and passed us. After he passed us his boat appeared to make a sudden turn to the right." (J.A. p. 31) "Mr. Long tried to turn his boat to the right in an effort to avoid Mr. Engle, but it didn't help and Mr. Engle hit our boat. I was thrown out into the water." (J.A. p. 32)

Appellant admitted that immediately before the accident he was traveling at the rate of 30 to 35 m.p.h. (J.A. p. 94) Appellee Long testified that the Engle boat veered off and into the Long boat after Mr. Engle struck a wake (J.A. p. 253). The following portion of appellee Long's deposition was read into evidence at trial:

"Question: What was the first thing that you noticed or saw happen out of the ordinary, either on his boat or your boat that indicated to you that something had gone wrong?

"Answer: Nothing happened on my boat. On his [Engle's] boat—the boat seemed—It jumped across a small—a wake. It might have been a foot high or it might have been smaller. And when the boat went across the wake it seemed to sort of—well, what it sort of—It just seemed to go out of control in the back when it hit this wake. Like it air borned. It hit the wake and it looked like the boat air borned out of the water for just a minute." (J.A. p. 96)

The weather was clear and the visibility very good. (J.A. p. 95) There was a seven to nine mile an hour breeze

which caused a small "chop" on the water. (J.A. p. 95) Immediately before the accident, Mr. Long noticed a wave or wake from another boat in front of appellant Engle's boat. (J.A. p. 249) This was larger than the "chop" on the water which was caused by the wind conditions. (J.A. p. 249) Appellee Long explained that several minutes before the accident occurred, a motor boat passed appellant's boat in the opposite direction. (J.A. p. 237) That this boat created a wake about one foot high. (J.A. p. 238) [But Long was unable to say whether or not this wake was the one that appellant Engle hit just before the accident. (J.A. p. 238)]

There were many boats on the Potomac River on the day of the accident. Miss Stull estimated that there were ten to fifteen boats within the radius of one or two city blocks from the area of the accident. (J.A. p. 35) Mr. Long said that the river was "full of boats" and "It seemed like when he hit me there was fifteen boats on the spot before people were even fished out of the water." (J.A. p. 95)

Appellant Engle's speed boat was an 18 foot Chris Craft Capri which originally contained a 131 horsepower engine. Shortly before the accident the original motor was removed and replaced with a 230 horsepower engine (J.A. p. 93). On only two or three brief occasions had appellant operated his boat after the installation of the 230 horsepower engine and prior to the date of the accident. (J.A. p. 216)

In his deposition, appellant Engle testified as to the manner in which his boat would react to a wave or wake of another boat:

"Any time on the Potomac, from my experiences on the water, any normal swell from any size craft can cause a boat, my boat to be put out of control. It doesn't have to be a large wake. It can be just a normal wake coming from any other craft any other size." (J.A. p. 223)

At the trial appellant testified that he did not recall whether he struck a wake before losing control of his boat. (J.A. p. 223) Counsel asked whether soon after the accident appellant told the Coast Guard that he lost control of his boat when he hit a "swell" or "wake". (J.A. p. 226) Appellant's counsel objected to the reference to the Coast Guard report. However, he could not refer the Trial Court to the portion of the law on which he relied. (J.A. p. 225) The Trial Court allowed the questioning of appellant to continue on the ground that the appellee was not offering the report into evidence, but merely asking appellant about the report. (J.A. p. 226) The statement given by Engle in the report, concerning the "hitting of the swell or wake", was essentially the same as the observation made by appellee Long as to what Engle's boat did before going out of control.

Appellee Emogene Stull called Edward H. Nabb to testify as a witness on boating accident causation.¹ Counsel for appellant Stull read into evidence the facts upon which the hypothetical question was based. (J.A. p. 92 thru p. 96) The expert was then asked the following question:

"Q. Mr. Nabb, please assume that two inboard speedboats were cruising south on the Potomac River, approximately opposite Fort Belvoir; that the boat on the left, looking south, was a 1953, eighteen foot Chris-Craft Capri, powered by a 230 horsepower Crusader Marine engine; that the boat on the right was a 1956, twenty foot Century Coronado, with a 250 horsepower Crusader Marine engine; that the Chris-Craft Capri had three persons seated in it, including

¹ Mr. Nabb has testified in other cases and courts concerning boat safety and boat operations. Mr. Nabb is a member of the Marine Racing Hall of Fame; a world speed boat record holder; author of articles for "Yachting" and "Popular Boating" magazines and author of articles for "Skipper" magazine. Concerning boat safety, Mr. Nabb has acted as the head of the Insurance Committee of the American Power Boat Association for the past eight to ten years. Mr. Nabb professionally tests power boats and has written two books on boating. (J.A. p. 87 & 88)

the operator; that the Century Coronado was occupied by seven persons; that the Chris-Craft Capri was leading the boat on the right by approximately fifty feet and was approximately 100 feet to the left of the Century Coronado; that both boats were cruising between 30 to 35 miles per hour; that it was daylight and the weather was clear; that there was a wind of approximately 7 miles per hour, which created a slight chop on the water; that there were approximately 15 other boats, including cabin cruisers, within the vicinity of one half mile of the two cruising boats; that a small outboard motorboat had just passed the two boats; that the Chris-Craft Capri then appeared to become air borne or to go into the air; that after hitting the wake, the Chris-Craft Capri went out of control, made a sharp turn to the right, traversed the distance between it and the Century Coronado and collided with the Century Coronado; that the bow or front of the Chris-Craft Capri collided with the left side of the Century Coronado; that the Chris-Craft sank immediately after the accident; and that the Century Coronado was damaged and its passengers were thrown into the water. Assuming these facts, Mr. Nabb, please tell Her Honor, in your professional opinion, what the cause of the accident was."

Mr. Nabb then testified as follows:

"The Witness: I think I remember it, Your Honor. It is my opinion that this accident was caused by the boats traveling at a speed greater than was safe in relatively well-populated waters. Added to that was a factor that the leading boat—

The Court: That the what?

The Witness: The leading boat, the boat that was to the left and ahead, had apparently been repowered with a larger engine than that with which it came equipped.

The Court: The leading boat had a—

The Witness: A larger engine.

The Court: Which do you consider the leading boat?

The Witness: The boat to the left, the Engle boat (Sic) is the leading boat. And the secondary accident, in my opinion, was caused because the following boat,

the Long boat, was in a dangerous position in comparison to the Engle boat.

By Mr. Cramer:

Q. What effect did the wake have upon this accident, the wake that Mr. Long testified in the deposition that Engle struck? A. From the wording of your hypothetical question, it is my opinion that the wake was one of the large contributing factors to the accident. Had the Engle boat slowed down and met the wake—

The Court: Had the Engle boat slowed down and what?

The Witness: And met this wake, which is nothing more than an artificially caused wave, it is my opinion that he would not have lost control of his boat.

By Mr. Cramer:

Q. Now, the weather conditions and the visibility have been described. The wake has been described as almost a foot high. In your experience in operating boats, how far away from the wake should it be observed by the boat operator? A. It is my opinion that a wake a foot high should be observed by the ordinary operator at least 100 yards before it reaches him, in such weather conditions.

Q. I take it from what you say, Mr. Nabb, that there are standard operating procedures for speedboat operators in going across for meeting wakes? A. Yes, I think the answer to that would be yes.

Q. And these procedures for safely meeting and going across wakes, they were not applied here, I take it, is that correct?

Mr. Gregg: I object, Your Honor, this witness can't possibly know that, from this question.

The Court: The objection is sustained to the form of the question.

By Mr. Cramer:

Q. Now, do you know what the original power engine of this 1953 Chris-Craft Capri was?

The Court: Now, you have given him this hypothetical question, and you asked him if he knows. If

you want to put a question to him you can ask him, if it is in the evidence, to assume that it was so-and-so and then answer the question.

Mr. Cramer: This question about the placing of a higher engine in the boat is not something that is in evidence but it is something which the expert knows by familiarity with the boat and familiarity with the engine that was in there.

The Court: You mean that a particular boat has a certain engine, is that what you are saying?

Mr. Cramer: Yes, ma'am.

The Court: All right.

By Mr. Cramer:

Q. What type of engine comes equipped with this boat originally? A. Sir, I don't want to confuse Her Honor, but in your hypothetical question you asked me about a 1953 Chris-Craft Capri. The Chris-Craft Capri was first built in 1955 and it came equipped with either a 100 horsepower six-cylinder or a 131 horsepower six-cylinder engine.

Q. And according to the hypothetical case, at the time of the accident the motor in the Engle boat was a 230 horsepower Crusader Marine engine? A. Yes.

Q. And that is an increase of about 100 horsepower? A. It could either be an increase of 130 horsepower or 100 horsepower.

Q. What, specifically, effect does that have in this type of case? A. The 230 horsepower Crusader is a heavier engine than the 100 horsepower Chris-Craft or the 131 horsepower Chris-Craft. Each of the Chris-Craft engines weighs about 700 pounds, and the Crusader engine weighs between 900 and 1,000 pounds. In the Capri line of boats, the engine is installed toward the transom, toward the back end of the boat, and the additional weight in the back end of the boat changes its handling characteristics.

The Court: Changes what?

The Witness: The handling characteristics of the boat, the driving, the control characteristics. And the increased horsepower, if used, very greatly changes the handling characteristics of the boat because it makes the boat capable of going faster than it was designed to go. Said another way, it would be some-

thing like putting a very large Cadillac engine in a very small Chevy II automobile, it makes a rather tricky arrangement to handle.

By Mr. Cramer:

Q. Then do you feel as a result of the changing of the engine that the Engle boat was a difficult one to handle at that time? A. It would be my opinion that it would be difficult for me to handle a boat so equipped.

Q. Can you give us an estimation, your opinion, as to the effect of the boats in the area, there were other boats in the area, I am giving you a hypothetical, what effect did this have on standard operating procedures that a boat operator such as Mr. Engle and Mr. Long should follow? A. I guess the best answer is that it is the difference between driving your car alone on a country road and driving it on a busy freeway. You must expect the other driver to do things that you don't anticipate, and you certainly must anticipate such things as wakes, as the normal rule of the water from traffic.

Q. Is it your opinion in these circumstances that Mr. Engle should have anticipated the wake as well as even seen the wake? A. According to your hypothetical question, any operator should have anticipated wakes coming from almost any direction in these well-populated waters.

Q. And taken precautions when he saw the wake, is that correct? A. That is true, sir.

Q. And, again, the wake is what caused, in your opinion, Mr. Engle's boat to go off its course, hitting the wake as he did, go off its course and go into Mr. Long's boat, is that correct? A. In my opinion, it was a very strong contributing factor.

Mr. Cramer: All right. Thank you very much."

Mr. Hildebrand testified as an expert witness for the defense. Concerning the possibility of striking a submerged log, he stated that if a boat struck a submerged log, the striking would be indicated to the operator by a loud noise. (J.A. p. 206) Appellant Engle and one of his passengers, Mr. Weiss, did not testify that they heard any unusual

sounds prior to the accident. Mr. Weiss testified that he did not see any logs prior to the accident. (J.A. p. 213) Appellee Long examined appellant's boat after the accident. He testified that after the accident, the Engle boat sunk and the boat was dragged under water to the shore. Mr. Long testified that:

"and of course in dragging it under water, it would tear the rudder off because it is just a shaft and a flat piece of brass." (J.A. p. 251)

Emogene Stull, appellee, has a 25% permanent functional loss of the entire left hand. On this both doctors, that is, the one presented by appellant and appellee Stull, agreed. (J.A. p. 153, p. 243)

As a result of the collision, appellee Stull was thrown from the boat and into the river. (J.A. p. 33) She was in the water for about 45 minutes as other boat operators tried to help her get out of the water. (J.A. p. 34) Miss Stull was taken to the Fort Belvoir Army Hospital where two doctors and a nurse worked on sewing and repairing the tendon and nerve in the left hand. (J.A. p. 36)

Appellee was thereafter seen by her physician, Dr. Mandamis, who referred her to a surgeon, Dr. Douglas Koth. (J.A. p. 36) Dr. Koth devotes much of his practice to surgery of the hand. (J.A. p. 147) Because appellee Stull had lost the movement in the thumb and index finger of her left hand, Dr. Koth referred her to Dr. Buchanan, a specialist in physical therapy, (J.A. p. 37) who saw Miss Stull on 19 occasions (J.A. p. 291).

Dr. Koth testified that the digital nerve in Miss Stull's left hand was severed as a result of the accident. (J.A. p. 148) Dr. Koth later performed a biopsy and removed scar tissues and foreign bodies from Miss Stull's hand. (J.A. p. 37) In August 1963, Dr. Koth operated on Miss Stull at the Northern Virginia Doctors Hospital. (J.A. p. 38) He removed the neuroma that had formed in her

hand, and put the injured nerve back together again. (J.A. p. 150)

Dr. Koth testified that Miss Stull's injury causes two separate types of pain. The first occurs when any pressure is placed on the nerve itself. This may typically manifests itself with the reflex action of opening her hand, whenever Miss Stull attempts to hold any large or heavy object. (J.A. p. 151) The second type of discomfort is a constant deep aching pain located near the base of the thumb overlying the area of the joint as well as the area of the muscle that operates the thumb. (J.A. p. 150) Dr. Koth testified that as a result of the injury, Miss Stull has developed a permanent neuralgia and myalgia condition in her left hand; that this condition causes particular hardship to Miss Stull during damp and generally inclement weather; additionally, that air conditioning systems adversely affect Miss Stull's hand. (J.A. p. 155) Dr. Koth testified that the injury causes interference in the every day use of Miss Stull's hand both at work in her secretarial capacity and during ordinary functions at home. (J.A. p. 153)

Miss Stull, who is employed as a secretary for the Air Force Department, (J.A. p. 30) testified that the three year old injury to her hand has caused her typing speed to decrease by about 20 words per minute. (J.A. p. 43) She is now unable to properly coordinate her two hands on the typewriter key board. (J.A. p. 78) Miss Stull testified as to many other common discomforts and interferences with her duties caused by the injury. (J.A. pp. 41, 42)

In describing the pain in her hand, Miss Stull drew an analogy between her nerve injury and a toothache. "Well, it will ache almost like a constant toothache only there is nothing I can do to help it. With a tooth, I could go to the dentist, but there is nothing I can do for the pain." (J.A. p. 44) In this regard, Dr. Koth testified that the

only means of completely alleviating the nerve pain was to cut the nerve. However, this would result in a greater functional disability than now present. (J.A. p. 157) Dr. Koth testified to other procedures that could be followed which might help to lessen the pain. Wearing a glove for warmth at work so as to mitigate the affects of the air conditioning; wearing padding over the nerve so as to relieve pressure normally endured in that area; and taking analgesics. (J.A. p. 157)

Mrs. Joan Concaugh was called as a witness for appellee Stull. Mrs. Concaugh is Miss Stull's superior at her place of employment. (J.A. p. 140) She testified that she worked with appellee Stull before the accident of August 12, 1962 and up to the time of trial. (J.A. p. 140) Miss Concaugh testified that after the accident she often observed Miss Stull type with only one hand; that appellee's typing speed became slower after the accident and that Miss Stull tends to tire easily. The witness stated she observed Miss Stull on many occasions at work, rub her injured hand and hold it in an upright position. Mrs. Concaugh testified that on occasions she would have to type for appellee Stull. (J.A. pp. 140-141)

Mr. John Ward, appellee Stull's superior testified that Miss Stull's performance of her job functions were definitely impaired by the hand injury. (J.A. pp. 134, 135) For instance: "Gene (Stull) after a prolonged period of time, slows down quite considerably over the other girls." (J.A. p. 135)

Counsel for appellee Stull, on several occasions, sought to elicit from both of Miss Stull's working superiors what affect the injury has had on her ability to obtain pay raises. Counsel for appellant strongly objected to the admission of any evidence concerning the effect this injury will have on Miss Stull's ability to receive pay raises. (J.A. p. 136) (J.A. p. 141)

Dr. Koth testified that Miss Stull will probably incur future medical expenses because of the hand injury. (J.A. p. 157)

Both doctors who testified agreed that Miss Stull's injury is not to her fingers alone, but to the entire hand. They both agree that appellee Stull has sustained a 25% functional limitation of the use of her hand, and that this loss is permanent (J.A. p. 153 and J.A. p. 243). Miss Stull has a life expectancy of 55.5 years. (J.A. p. 184)

STATEMENT OF POINTS

1. There was substantial evidence to support the Trial Court's conclusions that appellant negligently caused the collision in question, and that appellee Stull's injuries were the proximate result of the collision.

2. Both the medical experts offered by appellant Engle and appellee Stull agree that Emogene Stull has suffered a permanent loss of twenty five percent (25%) of the function of her left hand.

3. The hand injury causes a constant deep aching pain in the hand, that can only be eliminated by the severance of the nerve.

4. Appellee Stull suffered other injuries in addition to the hand injury, and endured a terrifying experience in the water after her injury.

5. Appellee Stull has a life expectancy of 55.5 years.

6. The causation of this boating accident was not within the common knowledge of laymen, and the trial court properly admitted expert evidence on this subject.

7. The Trial Court properly permitted appellee Stull to cross examine appellant on the cause of the accident by referring to statements contained in appellant's deposition and similar statements in his report to the United States Coast Guard.

8. The Trial Court properly controlled the cross examination of all witnesses including appellee's medical expert and boating expert.

9. The award was not excessive.

10. The Trial Court conducted a fair hearing.

STATUTES RELIED UPON BY APPELLEE STULL

Statutes involved appear at page 28.

SUMMARY OF THE ARGUMENT

1. Appellant contends that it was incumbent upon appellee Stull to explain away every possible cause of the accident which was not consistent with appellant's negligence. This is not the law. The plaintiff is not required to negative entirely all factors that might have possibly contributed to the cause of the accident. There is substantial evidence to support the Court's finding that the accident in question was caused by appellant's negligence.

2. The trial court, sitting without a jury, properly admitted expert testimony concerning the causation of the accident, since comprehension of the causation of boating accidents is beyond the competence of the average layman.

3. The trial court's award was not excessive in consideration of the fact that appellee Stull, a twenty-one year old secretary, suffered an admitted 25% permanent loss of function of her left hand; and in further consideration of the constant and deep pain incident to the injury, the past and future cost of medical care and related expenses. The Trial Judge was in a position to observe all witnesses.

4. The trial court did not err when it permitted appellee Stull's counsel to question appellant about statements he made in his report of the accident to the Coast Guard, and thereby refresh appellant's recollection of the facts surrounding the accident.

5. The trial court is allowed to exercise some discretion on the manner and extent of cross-examination. The trial court conducted a fair and impartial hearing.

ARGUMENT**I****There Is Substantial Evidence to Support The Court's Finding
Of Appellant's Negligence**

The Court found, as a matter of fact, *inter alia*, the following:

“Number 5; At the time of the collision and just prior thereto, the visibility was good and there was a prevailing wind of approximately seven miles per hour, leaving a slight chop on the water. The water contained wakes from other boats which in the exercise of ordinary care and caution should have been visible to Defendant Engle. He proceeded through the area without taking corrective action, such as reducing his speed, which a reasonably prudent man would have taken under the same circumstances. His boat hit a wake and went out of control and veered to the right, striking Defendant Long's boat.” (J.A. pp. 17 and 18)

Appellant states in his brief that “Miss Stull adduced no proof of what actually caused appellant's boat to go out of control.” This is not so. Mr. Edward Nabb testified that appellant's boat went out of control when it hit a wake while appellant was operating his boat at an excessive rate of speed under the then existing circumstances.

Appellant contends that appellee's explanation of the causation of the accident should not have been accepted by the trial court because two other factors, in appellant's own language, might “possibly” have contributed to the causation of this accident. These possibilities were the following: That it was “possible” that appellant's boat hit a submerged log or debris “which appellant could not have seen and which might have been far enough below the surface to damage his rudder without his being aware of what happened.” (p. 22 of Appellant's Brief) The second “possibility” was that “a wake could have been created so quickly that appellant would have been unable

to see it in time to take evasive action.” (p. 24 of Appellant’s Brief) As to both of these “possibilities” Appellant offered no evidence whatsoever. In fact, Mr. Hildebrand testified that had the rudder been hit by a submerged log, the occupants of the boat would have been cognizant of it by virtue of an unusual sound. Mr. Long testified that he examined the boat after the accident and found that the rudder was sheared off. However, Mr. Long testified that the boat was dragged along the bottom of the river after the accident and that this dragging could have caused the rudder to break off. As concerns the “possibility” that a wake could have been created so quickly that appellant would have been unable to see it, neither appellant nor appellee Long testified that a wake was in fact caused so quickly. In fact, there appears to be only one reasonable inference that could be drawn from the evidence—the one the trial court drew—that the wake was caused by one of the numerous boats in the area. A reasonable or prudent man would have anticipated that those boats would have caused a wake, and he would have reduced his speed. Of course, there were other possible causes for the collision, but this Court has always abided by the rule that the trier of the facts should accept only *reasonable* inferences, not *possible* inferences.

The essence of appellant’s first argument is that it was incumbent upon appellee Stull to explain away each and every “possible” cause of the accident which was not consistent with appellant’s negligence. In support of this argument, appellant writes the following in its brief: “Decisive here is this Court’s statement in *Brown v. Capital Transit Co.*, 75 U.S. App. D.C. 337, 338, 127 F. 2d 329, cert. denied, 317 U.S. 632 (1942):

“If causes other than the negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence. Here the sum and

substance of appellant's evidence is that an injury occurred.

"We are of the opinion that the trial court, in directing the verdict, properly took away from the jury the opportunity to guess and speculate, as they must have done to reach a verdict in this case."

In fact, *Brown v. Capital Transit Co.* does not stand for this proposition. The import of the Court's opinion in *Brown* is clearly understood when the facts of the case are considered. The *Brown* case involves a passenger's fall on a streetcar exit step or platform. At P. 338 the Court recorded plaintiff's description of the causation of her fall:

"I couldn't see that there was anything wrong, but there must have been something wrong or it would not have pulled the heel off my shoe . . . it was an iron platform, and had iron hobnails on it and the approach to it . . . I guess they were there to keep people from slipping."

In consideration of this testimony, the Court, at p. 338, said:

"If causes other than the negligence of the defendant might have produced the accident, the plaintiff is bound to exclude the operation of such causes by a fair preponderance of the evidence. Here, the sum and substance of appellant's evidence is that an injury occurred. We are of the opinion that the trial court, in directing the verdict, probably took away from the jury the opportunity to guess and speculate as they might have done to reach a verdict in this case."

In the instant case, as opposed to the *Brown* case, there was clear testimony as to the causation of the accident. There was testimony that appellant's boat was entering an area trafficked by many other boats; that a small boat passed appellant's boat in the opposite direction; that a wake was created by another boat in front of appellant's

boat; that visibility was good; that an ordinary operator would anticipate wakes in an area where other boats were operating and even see a wake a hundred yards away; that a sensible operator would have reduced his speed for safety's sake; that appellant did not reduce speed but continued on into the wake and lost control of his boat.

By relying on *Brown*, appellant apparently contends that appellee Stull did not exclude his suggestion of the other possible causes of the accident by a fair preponderance of the evidence. First, he argues that the boat could have hit a submerged log and gone out of control. Yet, his own expert witness said this would create a noise which neither appellant nor his passenger heard. Appellee Long did say the rudder of the boat was gone which could indicate the boat hit something. But, he then qualified that statement by saying the rudder could just as easily been knocked off when he dragged the boat across the bottom of the river when removing it from the water. Next, appellant argues that the wake could have been created so quickly that he could not avoid it. But, there is absolutely no testimony that a wake was created suddenly. There is no testimony that another boat suddenly started to move while close to appellant's boat so as to create such a wake. Naturally, appellee Stull is not required to exclude what is not there.

This Court epitomizes a plaintiff's burden of proof in the case of *Christie v. Callahan*, 75 U.S. App. D.C. 133, 124 F. 2d 825, where, at page 147, it said:

"Generally speaking, direct and positive testimony against specific acts of negligence is not required to establish it. Circumstantial evidence is sufficient either alone or in combination with other direct evidence. Circumstantial evidence may contradict and overcome direct and positive testimony. The limitation on its use is that the inferences drawn must be reasonable. *But there is no requirement that the circumstances, to justify the inferences sought, negative every other positive or possible conclusion.* The law is not so

exacting that it requires proof of negligence or causation by testimony so clear that it excludes every other speculative theory." (emphasis supplied)

In *Prosser, Law of Torts*, second edition, there appears, on page 22, the following statement:

"The plaintiff is not, however, required to prove his case beyond a reasonable doubt. He need not negative entirely the possibility that the defendant's conduct was not a cause, and it is enough that he introduces evidence from which reasonable men may conclude that it is more possible that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise."

In the proof of this case appellee Stull relied upon Article 29, of the Inland Rules of the Road, Title 33 U.S.C. Sec. 221 which provides:

"Nothing in these Rules shall exonerate the owner . . . of any neglect to keep a proper lookout, or of neglect of any precaution which may be required in the ordinary practice of seamen, or by the special circumstances of this case."

Appellee Stull also relied upon the Federal Motor Boat Act, 46 U.S.C., Sec. 536.1, 54 Stat. 166, which in pertinent Court, provides:

"No person shall operate any motor boat or any vessel in a reckless or negligent manner, so as to endanger the life, limb or property of any person."

In *The Adventuress*, 214 F. 835 (1914, D.C. Mass.) a case involving a collision between two motor boats, the Court said, at page 838:

"One must observe reasonable care and prudence, not only against present dangers, but against impending perils. He must take seasonable measures of precaution."

II

The Trial Court Properly Admitted Expert Testimony as to the Causation of the Accident in Question

Appellant argues that the facts of this case were so simple that the testimony of appellee Stull's expert witness was superfluous and should have been excluded. Yet, appellant apparently relies on the testimony of the "expert" presented on behalf of appellee Long, in his first argument herein where he attempts to show other causes for the accident. Regardless of appellant's contradictory positions, an expert was not only proper, but helpful and necessary.

When the conclusion to be reached is not one within the common knowledge of laymen, expert testimony may provide a sufficient basis for it. *National Lead Co. v. Schuft*, 176 So. 2d 610, (8 Cir. 1949); *Dunhan v. Village of Canisteo*, 303 N.Y. 498, 104 N.E. 2d 872. To warrant the use of expert testimony, the subject of the inference must be distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman and the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth. *McCormick On Evidence*, 1954 Sec. 13.

In *Naibrunn v. Himborg American Line*, 77 F. 2d 305, CCA 2d, 1935 a passenger on an ocean liner was injured during a storm when heavy seas broke a glass enclosure of a bulkhead behind which the passenger was sitting. Some of the questions to be decided were whether the section in which the passenger was injured should have been roped off, and whether steel rather than glass should have been used as a protection for that particular area. The Trial Judge prohibited the use of expert testimony on these subjects and directed a verdict which was reversed. In reversing, Judge Learned Hand, at page 305, said:

"Nor do we understand why so much of plaintiff's proof should have been ruled out. True, it was in

the form of expert opinion, and it is always wise to keep that well in hand, but the issues were beyond the personal acquaintance of the jurors; they had to rely upon experts for any relevant information at all. It was the experts who alone could judge what weather required roping and whether steel, not glass, was necessary for safety at the corners of the deck. It is ordinarily more convenient to receive the testimony in the form of conclusions and to leave to cross examination the test of their foundation."

In the cases relied upon by appellant in support of its argument, the factual situations involved the application of knowledge that was commonly possessed by the trier of the facts. And, in *St. Lewis v. Firestone*, 130 A. 2d 317 (D.C. Ct. App. 1957), chiefly relied upon by appellant, the Court held that no skilled training or special knowledge was applied by the expert in reaching his conclusion.

In 2 *Jones On Evidence* § 431, *Vessels and Navigation*, there appears the following statement in connection with an excerpt on Expert Witness and Maritime cases:

"Nautical and maritime matters are ordinarily of so special or technical a nature as to be known and understood only by persons connected with the business of operating and managing vessels or persons otherwise having special skill or knowledge relating thereto. Accordingly, it is the common practice of the Courts to receive in evidence the opinions of persons who are shown to be thus specially informed. For example, the opinions of nautical men are received for the purpose of determining . . . the probable cause of collisions or the loss of vessels and the mode of avoiding collisions or loss, . . . *Weaver v. Alabama Coal Mine Co.*, 35 Ala. 176; *Western Insurance Co. v. Tobin*, 32 Ohio St. 77; *Clipper Steamboat v. Logan*, 18 Ohio 375."

In *Manhattan Oil Co. v. Mosby*, 72 F. 2d 840, (C.C.A. Mo. 1934) expert testimony was admissible concerning the effect upon cattle drinking salt water. And, in *Bank of Vance v. Crowder*, 194 N.C. 331, 139 S.E. 604 (1927) expert

testimony was admissible to explain a bank cashier's entries.

The scope and limitation of hypothetical questions must depend largely upon the circumstances in each case and, to a great degree, should be left to the discretion of the Trial Judge. *Fuchs v. Aronoff*, (D.C. Mun. App.) 46 A. 2d 701. It is submitted that the causation of the accident in this case is distinctively related to a field beyond the competence of the average layman and the trial court did not err in admitting the testimony of appellee's expert.

III

The Court's Award of Damages Was Not Excessive

Appellant characterizes Miss Stull's injury as "what was, in effect, a cut on the base of her left thumb." Appellee Stull's injury was not as appellant characterized it. The injury is painful, permanent and incapacitating.

On Page 27 of Appellant's brief, he states that Miss Stull "claims" to suffer a twenty-five percent limitation of function of her left hand. Actually, this estimate of 25% permanent limitation of function of her left hand was testified to by a medical expert of Appellant's own choosing. (J.A. p. 243) The injury involved severance and damage to the digital nerve of her left hand. Medical testimony was given to the effect that the injury to the digital nerve of the left hand can cause a constant and deep aching. (J.A. p. 151 through 154) Appellee Stull's doctor, Douglas Koth, stated that the only way to alleviate the pain was to sever the digital nerve of the left hand.

Appellee Stull offered a considerable amount of testimony from co-employees and superiors concerning the pain in her hand. Appellee was precluded, by objection from appellant, from proving the effect that the accident had on Miss Stull's earning capacity.

The trial court had substantial opportunity to hear and observe all of the medical experts' testimony, the testimony of Miss Stull, and the witnesses to her pain and suffering. The trial court did not render her decision immediately after the trial, but considered the case approximately two weeks after hearing the evidence. The Trial Judge of twenty years experience obviously gave exceptional thought to what would constitute adequate compensation for the enormous amount of pain, suffering and inconvenience already endured and admittedly to be endured for the estimated 55.5 years remaining in Appellee Stull's life.

Counsel for Miss Stull finds it difficult to cite cases where similar injuries were awarded, as each case and each injury must be decided on its own merits. However, the law recognizes that damages are not susceptible to determination on the basis of a formula. *Frank v. Greyhound*, 172 F. Supp. 190 (D.C. D.C.) The sole question is whether the verdict was brought about by passion or prejudice. *Graling v. Riley*, 214 F. Supp. 234 (D.C. D.C. 1963) Counsel for appellee Stull submits that the award represents a fair amount of compensation for the pain and suffering already endured and to be endured in the future, and for the past and future medical expenses.

IV

The District Court Did Not Err in Allowing Appellee Stull's Counsel to Refresh Appellant's Recollection on the Basis of a Statement Made by Him and Contained in a United States Coast Guard Accident Report

The report made by appellant, and referred to during cross-examination of appellant, was given to the United States Coast Guard rather than to the Maryland Department of Tidewater Fisheries. (See Order for production of Coast Guard Report J.A. p. 5 and production statement made by appellant J.A. p. 13) Therefore, Article 14B, Section 9(b) and (e) of the Annotated Code of Maryland, is not

applicable to the issues here raised by appellant. Nothing in the Coast Guard Regulations prohibits the use of reports in Court. In any event, the accident report made by appellant was not admitted in evidence. It was merely used for purposes of refreshing the appellant's memory of the circumstances surrounding the accident. This is shown by a colloquy between the Court and Appellee Stull's counsel which appears as J.A. p. 266:

"The Court: You know, it seems to me that it doesn't make any difference—Are you trying to offer the report itself or simply to ask him about it?

Mr. Cramer: Just to ask him about it.

The Court: Well, you may ask him what he said on that occasion [the report]."

What appellant is arguing is that because the same report was filed by him with both the U.S. Coast Guard and the Maryland Department of Tidewater Fisheries, appellee Stull should have been prohibited from using the Coast Guard report in refreshing appellant's memory because of the Maryland law. This is not a correct analysis of the law. Whether statements made by a person reporting to the Coast Guard can be used in Court for impeachment purposes depends entirely upon Federal law. Title 46, Code of Federal Regulations, Section 173, 10-1, provides: " * * * individual 'Boating Accident Reports', or copies or excerpts therefrom, will not be released."

In considering the above regulation and its meaning, it must be compared with other statutes and regulations governing similar reports made to other Federal agencies. In *Tansey v. Transcontinental & Western Air*, 97 F. Supp. 458, (D.C. D.C. 1949), the plaintiff in a personal injury action sought to obtain a copy of the defendant's statement given to the Civil Aeronautics Board in the course of the Board's investigation of the accident. In opposing the motion for disclosure of its statement to the Board,

the defendant relied upon the Civil Aeronautics Act, quoted on page 450 as follows:

"The records and reports of the former Air Safety Board shall be preserved in the custody of the secretary of the Civil Aeronautics Board in the same manner and subject to the same provisions respecting publication as the records and reports of the Authority, . . . and that no part of any report or reports of the former Air Safety Board or the Civil Aeronautics Board relating to any accident, or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such reports."

The Court allowed the plaintiff to inspect the reports made by the defendant to the Board. Chief Judge Laws ruled that the above quoted provision applied only to the investigation made by the agents of the board, and not to the accident reports that the defendant airline was compelled by law to file. To the same effect, *Fidelity and Casualty Company of New York v. Frank*, 214 F. Supp. 803 (D.C. D.Conn. 1963)

In *Yanick v. Pennsylvania Railroad Company*, 192 F. Supp. 373, (E.D. N.Y. 1961) the Court held that the plaintiff was entitled to impeach a witness to a railroad accident on the basis of a prior inconsistent statement made by that witness to the Interstate Commerce Commission, notwithstanding the fact that the Interstate Commerce Commission's investigation was, by law, confidential.

In *Ritts v. American Overseas Airlines*, 97 F. Supp. 457, (D.C.S.D.N.Y. 1947) the Court held that a statement given to the Civil Aeronautics Board was subject to discovery for purposes of impeachment even though the Act governing the report on its face prohibited such use.

Appellee Stull strongly contends that it is not the Maryland statute that controls this case but rather the U.S. Coast Guard regulation. When the Coast Guard regula-

tion is compared with other similar regulations concerning accident reports made to Federal agencies, it is clear that what was done in this case was not only permissible, but correct. Compare the words "shall not be released", which is in the Coast Guard regulations, to "no part of any report * * * shall be admitted as evidence" is contained in Federal Civil Aeronautics Act. Yet, as previously said, statements made by a person reporting an accident to the Civil Aeronautics Board have been held admissible in Court for impeachment purposes.

In this case appellant testified that he could not remember encountering a wake just before the collision. On cross-examination, he was asked and admitted stating in a deposition, that immediately before the accident his boat hit a wake or swell and went out of control. He was also asked and admitted that he reported that fact to the U. S. Coast Guard. Of course, the purpose of the cross-examination was to remind and have appellant admit his previous statements. In this regard it was successful. To have prohibited appellee Stull this type of cross-examination would have placed an unreasonable burden on her that was never anticipated by the applicable U. S. Coast Guard regulation. *Tansey v. Transcontinental & Western Air*, (supra).

V

The Trial Court Did Not Err in its Rulings Concerning the Cross Examination of Appellee Stull's Treating Physician

In the instant case, there is not a large area of medical disagreement as to appellee Stull's injuries. Both doctors agree that Emogene Stull suffered a 25% permanent limitation of the function of her left hand.

Appellant complains that he was not permitted, during cross-examination of appellee Stull's doctor, Douglas Koth, to examine that doctor's entire file even though the doctor

testified that some of the papers were not used by him as a basis for his testimony, and that he did not feel competent to explain them. (J.A. p. 172) At trial appellant asked to see all of the papers in the doctor's file. This was objected to and the trial court ruled that appellant was entitled to see and to be cross-examined on any and all papers and documents which formed the basis of his testimony and on which the doctor relied. In accordance with this ruling, all papers relied upon by the doctor were shown to appellant. (J.A. pp. 172-174) Appellant did not object to this procedure. (J.A. pp. 170-176) In fact, appellant then continued to use these memorandum in an effort to contradict the doctor. (J.A. pp. 172-176)

During trial, appellant's position concerning what questions could be submitted to Dr. Koth was not consistent. On page 156 of the Joint Appendix appellee Stull's counsel sought to elicit from Dr. Koth the general medical opinion concerning the type of injury suffered by Miss Stull. Counsel for appellant objected, and was sustained, on the grounds that the purpose of Dr. Koth's testimony was to reveal what he, and not what other medical witnesses knew about Miss Stull's condition.

The trial court has discretion in the placing of reasonable controls on cross-examination. *Briscoe v. United States*, 119 U.S. App. D.C. 41, 336 F. 2d 960 (1964). Appellant has cited no authority which prohibits the procedure followed in this case. *Branch v. United States*, 84 U.S. App. D.C. 165, 171 F. 2d 337 (1948)

Albaugh v. Pennsylvania R.R. Co., 95 U.S. App. D.C. 389, 127 F. 2d 744 (1942); and *Mintz v. Premier Cab Association*, 75 U.S. App. D.C. 389, 127 F. 2d 744 (1942), cited by appellant, represent nothing more than the proposition that the cross-examiner is entitled to have a full explanation of the direct testimony.

In *United States v. Trenton Potteries*, 273 U.S. 392 (1927), the Court held that where the trial court receives much evidence and conducts a wide range of inquiry, a new trial is not lightly to be ordered on technical errors in the admission of evidence which does not affect matters of substance.

CONCLUSION

Based upon the foregoing, counsel respectfully submit that the judgment herein should be affirmed.

Respectfully submitted,

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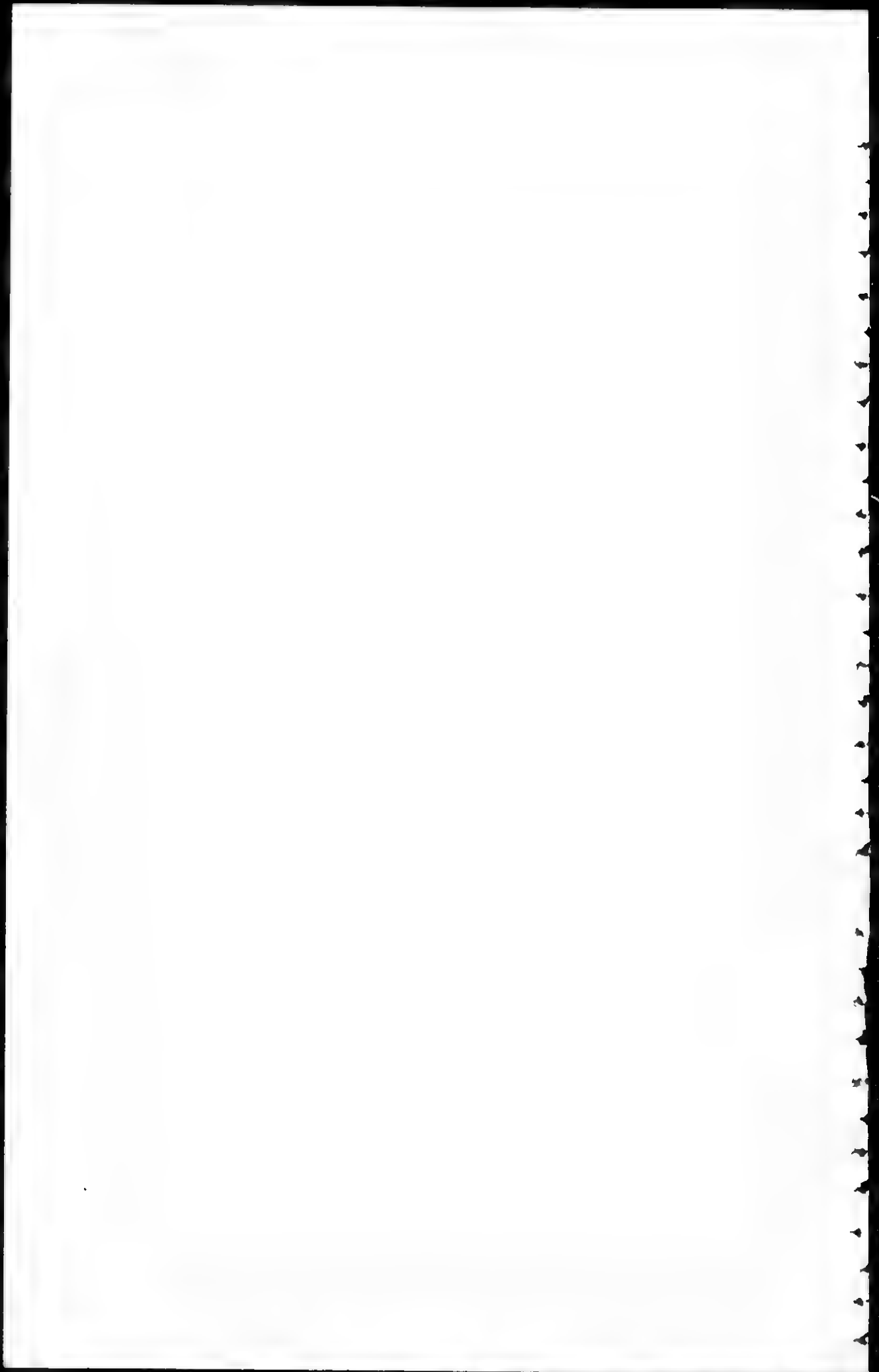
Statutes Relied Upon by Appellee Stull

Article 29, Inland Rules of the Road, Title 33 U.S.C. § 221 provides:

“Nothing in these Rules shall exonerate the owner . . . of any neglect to keep a proper lookout, or of neglect of any precaution which may be required in the ordinary practice of seamen, or by the special circumstances of this case.”

Federal Motor Boat Act, 46 U.S.C., § 536.1, 54 Stat. 166 provides:

“No person shall operate any motor boat or any vessel in a reckless or negligent manner, so as to endanger the life, limb or property of any person.”



BRIEF FOR APPELLEE LONG

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,113

ROBERT I. ENGLE, Appellant,

v.

EMOGENE I. STULL and THOMAS LONG, Appellees.

**Appeal from the United States District Court for the
District of Columbia**

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 28 1966

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STATEMENT OF QUESTIONS PRESENTED

Whether the trial court was required, as a matter of law, to find appellee Long contributorily negligent because of his inability in a period of two or three seconds to maneuver his powerboat in such a way as to avoid appellant's somersaulting powerboat which had suddenly swerved out of control.

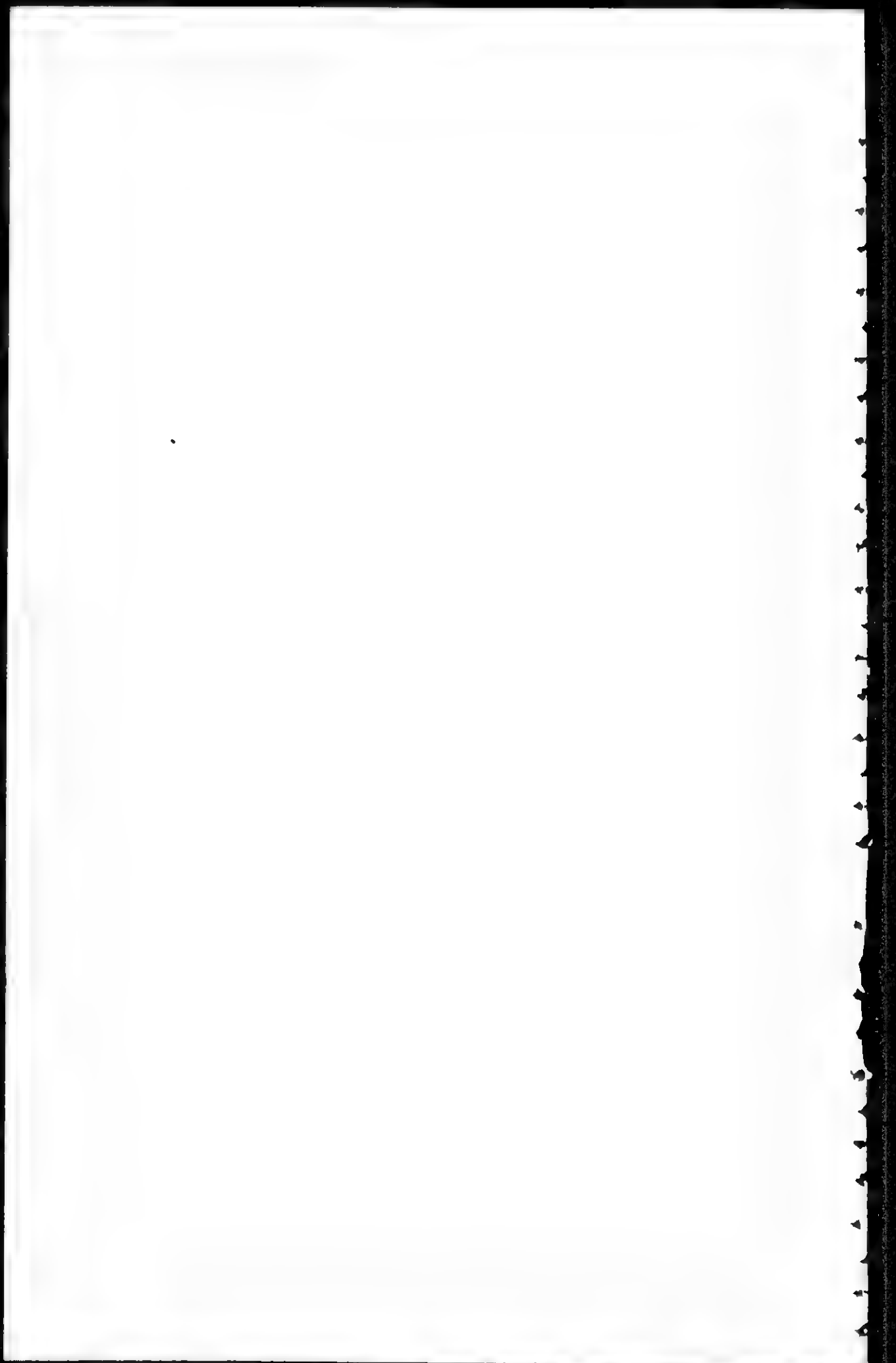
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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,113

ROBERT I. ENGLE, *Appellant*,

v.

EMOGENE I. STULL and THOMAS LONG, *Appellees*.

Appeal from the United States District Court for the
District of Columbia

BRIEF FOR APPELLEE LONG

COUNTERSTATEMENT OF THE CASE

This is an appeal from a final order of the United States District Court for the District of Columbia entered November 23, 1965 awarding appellee Stull (plaintiff below) damages for personal injuries in the amount of \$21,000 against appellant (JA 19). The suit, tried before the court without a jury, was for bodily injuries sustained by

appellee Stull as a passenger in a powerboat operated by appellee Long (a co-defendant below). Miss Stull was thrown from appellee Long's boat when it was struck by a powerboat operated by appellant (the principal defendant below)¹ which had swerved out of control. Hereafter appellant will be referred to as "Engle"; appellee Stull as "plaintiff" and appellee Long as "Long".

The court below found that Engle was negligent and that Long in the exercise of due care could not have avoided the accident and therefore was not negligent (JA 18). On appeal Engle makes three principal allegations: (1) that there was no negligence at all; (2) that Long was negligent; and (3) that the damages were excessive. In this brief Long will address only the second point.

The accident occurred on August 12, 1962 on the Potomac River south of Marshall Hall and involved two powerboats, one operated by Long (JA 232), and the other by Engle (JA 215, 233). Plaintiff was a passenger in Long's boat (JA 30). A short period before the collision Engle had put a new 230 horsepower engine in his boat, which originally had been powered by a 130 horsepower engine (JA 216).

The moment prior to impact both boats were cruising in a southerly direction one hundred feet apart at about 30 to 35 miles per hour, Engle's boat being approximately 50 feet in front of Long's (JA 93-94, 97, 219, 235-237, 247). This relative position was maintained by the two boats for approximately one-quarter of a mile when the accident occurred (JA 219, 235). It was a pleasant day (JA 70); there was a slight chop in the water (JA 236); and there were wakes from other boats (JA 218).

¹ Plaintiff's suit originally named Engle as the only defendant (JA 2); Engle filed a third-party complaint for indemnity or contribution against Long (JA 6); each cross-claimed against the other (JA 9, 11); and plaintiff joined Long as a co-defendant (JA 8).

Suddenly, without warning, Engle's boat swerved to the right out of control, turned completely over, and struck the left side of Long's boat (JA 33, 65, 96, 214, 220, 247). Engle's boat immediately sank, Long's boat was seriously damaged, and plaintiff was thrown into the water and injured.

Several witnesses presented testimony which supports the trial court's finding that Engle was operating at an unreasonable speed under all the circumstances. The principal circumstances were the relative positions of the two boats; the large number of other craft in the water; the wakes from other boats; the newly enlarged and relatively untried power plant in Engle's vessel; and the fact that there was absolutely no evidence of any submerged object or other possible explanation for Engle's complete and sudden loss of control of his fast-moving powerboat. Plaintiff presented expert testimony that the accident was caused by Engle's negligence and Long presented expert testimony that he was in no way negligent. Engle submitted no expert testimony.

Edward A. Nabb was called as an expert witness by appellant. He was shown to be thoroughly experienced in the construction, operation and repair of powerboats and had written many technical articles and several books on marine engines. He was also an experienced boat racing driver, being a world record holder in his class and a member of the Marine Racing Hall of Fame (JA 87). In addition, he was chairman for at least eight years of the Insurance Committee of the American Powerboat Association, in which capacity he worked closely with its safety committee, and he was the United States representative to the Union of International Motorboating (JA 88).

In answer to a hypothetical question summarizing from other evidence in the record the facts and circumstances describing the collision (JA 96-7), Mr. Nabb testified that the boats were traveling at a speed greater than was safe

in relatively well-populated waters (JA 100). [Plaintiff had earlier testified that Engle's boat "was actually jumping out of the water" (JA 72)]. The expert further testified that Engle's speed was aggravated by the fact that his boat had just been repowered with a much larger engine than it was originally equipped with (JA 101). He explained that this increased horsepower greatly changed the handling characteristics of the boat because it made it capable of going faster than it was designed to go. The witness likened this to putting a Cadillac engine in a small compact car (JA 103).

The witness further testified that Long's boat was in a relatively safe position just prior to the accident, thereby negating any inference of negligence with respect to Long's boat (JA 120). He said he knew of no rules of the road being violated by Long (JA 118) and that the Long boat was not an overtaking boat under such rules but rather one operating in parallel formation (JA 113).

Long testified that just prior to the accident his boat was operating at approximately 2800 revolutions per minute (JA 247). Mr. Nabb testified that the Long boat should be able to turn 4000 to 4400 revolutions per minute, and that it was not near its maximum speed at 2800 to 3300 (JA 116, 117). He testified that the latter speed could be cruising speed for such a boat, and that the experience of the operator would be an important factor (JA 117). Long later testified that he had seventeen years experience working with and on boats, and over 800 hours experience operating the boat that was involved in the accident (JA 232).

All of the witnesses, including Engle, testified that the boat operated by Engle went suddenly out of control, swung sharply to its right, turned completely over and struck the left side of the Long craft (JA 33, 65, 96, 214, 220, 247). Long testified that when he saw the Engle boat swerve to its right he attempted to turn his boat away,

and that his boat actually started to turn before the impact (JA 249). He referred to this turn as "hard to the right" (JA 250). When Long was later questioned on cross-examination concerning the time that elapsed between the appearance of the danger and his actions to avoid the accident, he referred to the time as "a short amount of time, it was quick" (JA 257); and then later he stated, "I immediately made a right turn or started bearing right to avoid him landing in my front seat" (JA 259). Stull was also questioned concerning the movements of the Long boat immediately prior to the impact, and she also stated that Long had tried to turn his boat to the right to avoid the accident (JA 32, 75). A passenger in appellant's boat, Jacob Frederick Weiss, called as a witness by Engle, testified, "it was only a matter of two or three seconds between the time all this took place" (JA 211, 212).

At the conclusion of plaintiff's case, her attorney admitted to the court below that the negligence against appellee Long was "not good"; (JA 190) and that "I don't think we have proven much of a case against Defendant Long, frankly, Your Honor." At the conclusion of the case, her attorney admitted to the court that, "As to Mr. Long, and I know the question is going to come up from the court, I am sure, I can't honestly say that I know anything that he did wrong" (JA 265).

Engle testified on his own behalf but could give absolutely no explanation for the accident. He said he saw nothing unusual prior to the accident (JA 220) but admitted on cross-examination that in a Coast Guard accident report he had filed he had stated that the accident was caused by his striking a wake (JA 223-227).

The court below ruled that Long was not negligent, and that Engle was. Specifically, the court found as a matter of fact that the two boats were operating at a speed of 30 to 35 miles per hour; that Engle had had only two hours

of operating experience with his boat subsequent to the installation of its new 230 horsepower engine; that the water contained wakes caused by other boats in the area which required that Engle reduce his speed under all the circumstances; that Engle failed to do so, hit a wake and lost control of his boat; and that Long in the exercise of due care was unable to avoid the accident (JA 18).

STATEMENT OF POINTS

1. The trial court's finding that Long was not negligent is supported by substantial evidence and is not clearly erroneous.

2. The "major-minor" rule and the doctrine of *in extremis* require that Long not be held responsible for the ensuing collision even if his reaction to the sudden danger of the uncontrolled Engle boat was not as skillful as it might have been.

SUMMARY OF ARGUMENT

1. The trial court's finding that Long was not negligent is supported by substantial evidence in the record and is not clearly erroneous. There was no evidence of any specific acts of negligence by Long and there was expert testimony that he had at all times operated his powerboat with due care. It was certainly reasonable for the trial court, as the finder of the facts, to reject appellant Engle's argument that Long, in the period of two to three seconds available to him, could have and should have taken prompt steps to avoid collision with the Engle boat which had suddenly swerved out of control.

2. Even assuming some negligence by Long, and that such negligence was a proximate cause of the accident, the admiralty doctrine of *in extremis* and the "major-minor" rule both require that Long not be held liable. The *in extremis* doctrine provides that if one vessel by wrongful navigation places another in a position of danger, the

vessel that caused the peril should alone be held responsible even if the other ship did not do everything possible to avoid a collision. The "major-minor" rule, also applicable, provides that where the concurring negligence of two vessels causes a collision, and the negligence of one vessel is gross and the other relatively minor, the vessel guilty of gross negligence is solely liable.

ARGUMENT

I. THE TRIAL COURT'S FINDING OF FACT THAT LONG WAS NOT NEGLIGENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS NOT CLEARLY ERRONEOUS

As in all non-jury cases, the scope of review on appeal is extremely limited. The judgment must be affirmed if there is substantial evidence to support the trial court's findings. See, e.g., *Socash v. Addison Crane Company*, 120 U.S. App. D.C. 308, 346 F. 2d 420 (1965); *Edell v. Casey*, 117 U.S. App. D.C. 214, 328 F. 2d 186 (1964);² Rule 52(a), F.R. Civ. P.³

Engle's brief is in a large part a rehashing of the testimony in an effort to portray the facts in a light most favorable to him. But as this Court noted in the *Socash* case, *supra* at 309 and 421, "We are not free to retry the issues or evaluate credibility of expert testimony; rather we are limited to deciding whether the choice made by the trier, in this case a judge, was a permissible choice under the evidence." And the Court recognized that this was true even though "on the cold record as we now read it, we might be inclined to draw different inferences and reach a different result."

² The Court here stated the rule as follows:

"Finding, as we do, that there is evidence in the record to support the findings of fact and conclusions of law entered by the District Court, and that these findings and conclusions are not 'clearly erroneous,' it follows that the judgment of the District Court must be and is affirmed."

³ Rule 52(a) provides:

"... Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to adjudge the credibility of the witnesses . . ."

A. There Was No Evidence of Negligence by Long

In his brief Engle argues that "there is not sufficient evidence in the record to support the finding of the District Court that there was no concurring or contributory negligence on the part of appellee Long . . ." (Brief for Appellant, Argument I). There was of course no burden on Long to disprove negligence on his part. The burden was on Engle and the plaintiff to prove their allegations of negligence against Long. Having failed to sustain this burden (a point conceded by plaintiff at the close of the trial) the trial court properly concluded that Long was not negligent.

Engle's argument, which must be that had there been a jury trial a directed verdict of negligence on the part of Engle would have been required, is not only without support in the record but is virtually inconceivable.

While Engle concedes that Long had no more than "two or three seconds" to react, he nevertheless attributes negligence as a matter of law to Long's failure in that short period of time to take successful measures to avoid appellant's somersaulting and uncontrolled boat. This is the slim reed upon which Engle rests his contention that the trial court was required to find as a fact not only that Long had failed to exercise due care but also that this failure was a proximate cause of the accident.

At the very least it is a matter for the trier of fact to determine whether the failure to successfully avoid a sudden danger in a period of two or three seconds constitutes negligence. But in the instant case there is no evidence in the record upon which any such finding of negligence might rest. A finding of negligence on the part of Long by the trier of fact, because it would be unsupported by substantial evidence, would have been reversible error. No expert testimony or other evidence was introduced tending to show that Long's reaction was anything but a

reasonable and ordinary reaction—even assuming the trier of fact believed there was time for appellee Long, from the moment he observed danger to the moment of impact, to consciously formulate a reaction that would have avoided the accident.

Nor is there testimony in the record to support Engle's contention that the accident necessarily would have been avoided had Long pulled back on the throttle. It is just as conceivable that the same or a far worse collision might have taken place had Long pulled back on the throttle and not turned to the right in an attempt to avoid Engle's tumbling boat. Clearly the two or three seconds available to Long did not provide adequate time both to slow down and to turn.

B. Under Applicable Principles of Admiralty Law, Long Cannot Be Held Liable Even Assuming He Did Not Pursue the Best Possible Course

Under applicable principles of admiralty law,⁴ even assuming, as Engle contends, that Long should have pulled back on the throttle rather than turned, Long still may not be held liable for the accident.

The admiralty doctrine of *in extremis* makes clear that even if Long's decision to swerve rather than to try to stop was not the best course to follow, he still would not be liable. The doctrine provides that a vessel placed in a position of a peril through no fault of its own, as in the instant case, is not held jointly responsible with the vessel creating the emergency solely because the former

⁴ Maritime torts are within the jurisdiction of admiralty, and are governed by admiralty law. *Robbins Dry Dock and Repair Co. v. Dahl*, 266 U.S. 449. This is true if the case is instituted as a suit in admiralty, or, as here, on the law side of a federal court. The same substantive law is applied even in an action before a state court under the "saving to suitors" clause. *Jordine v. Walling*, 185 F. 2d 662; *Branic v. Wheeling Steel Corp.*, 152 F. 2d 887 (3rd Cir.) cert. denied, 327 U.S. 801. 2 Am. Jr. 2d, Admiralty, 785-787.

did not then pursue the best available course. As stated in *The Lafayette*, 269 Fed. 917 (2nd Cir.):

It is also to be observed that, if one vessel places another in a position of extreme danger by wrongful navigation, the other ship is not to be held to blame if she does something wrong and is not navigated with perfect skill and presence of mind.

* * * * *

When a vessel is put in great peril without any fault of her own, the question of her negligence in a sudden emergency does not depend upon whether she did everything she might have done or pursued the best possible course. In such cases the rule is that a mistake made in the agony of almost collision is regarded as an error for which *the vessel that caused the peril should alone be held responsible*. (Emphasis added.)

See also *Sir William Reardon Smith & Sons, Ltd. v. San Pedro*, 226 F. Supp. 879 (D. Tex.) affirmed, 328 F. 2d 623 (5th Cir.); *The Potomac*, 70 App. D.C. 215, 105 F. 2d 94.

Furthermore, even were Long's instinctive reaction to swerve deemed to be negligent, he would nevertheless not be held responsible for the accident under the admiralty "major-minor" rule. This rule, in substance, provides that where the concurring negligence of two vessels causes a collision, and the negligence of one vessel is gross and the second is minor, the vessel guilty of the major negligence is solely liable.

The doctrine was applied in *The Potomac*, *supra* at 216 and 95, where this Court stated:

If this is true, it was such gross negligence on the part of *The Potomac* as makes it unnecessary to inquire what action the *Seabird* took in that extremity.

See also *The Victory*, 168 U.S. 410, *The Benalla*, 45 F. 2d 864 (D. N.Y.); 15 C.J.S., Collision, p. 23; 2 Am. Jur. 2d, Admiralty, p. 844.

CONCLUSION

The judgment of the District Court in favor of appellee Long on the complaint and the cross-claim of appellant should be affirmed.

Respectfully submitted,

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